MASTER
NEGATIVE
NO. 95-82346-1

COPYRIGHT STATEMENT

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted materials including foreign works under certain conditions. In addition, the United States extends protection to foreign works by means of various international conventions, bilateral agreements, and proclamations.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

The Columbia University Libraries reserve the right to refuse to accept a copying order if, in its judgement, fulfillment of the order would involve violation of the copyright law.

Author:
U.S. Congress. Senate.

Title:
Consolidation of railway properties

Place:
Washington, D.C.

Date:
1928

95-82346-1
MASTER NEGATIVE #

COLUMBIA UNIVERSITY LIBRARIES
PRESERVATION DIVISION

BIBLIOGRAPHIC MICROFORM TARGET

ORIGINAL MATERIAL AS FILMED - EXISTING BIBLIOGRAPHIC RECORD

BUSINESS
530.2
Un33

U.S. Congress. Senate. Committee on interstate commerce.
Consolidation of railway properties. Hearings before the Committee on interstate commerce, United States Senate, Seventieth Congress, first session, on S. 1175, a bill to promote the unification of carriers engaged in interstate commerce, and for other purposes... Washington, Govt. print. off., 1928
pt.1 23 cm.

RESTRICTIONS ON USE:

TECHNICAL MICROFORM DATA

FILM SIZE: 35 mm REDUCTION RATIO: 12x IMAGE PLACEMENT: IA (IIA) IB IIB

DATE FILMED: 2/2/95 INITIALS: DG

TRACKING # : MSH 01373, 02535

FILMED BY PRESERVATION RESOURCES, BETHLEHEM, PA.

BIBLIOGRAPHIC IRREGULARITIES

MAIN ENTRY: U.S. Congress. Senate.

Consolidation of railway properties...Part 2

Bibliographic Irregularities in the Original Document:

List all volumes and pages affected; include name of institution if filming borrowed text.

_____Page(s) missing/not available:_____

_____Volume(s) missing/not available:_____

_____Illegible and/or damaged page(s):_____

_____Page(s) or volume(s) misnumbered:_____

_____Bound out of sequence:_____

__X__Page(s) or volume(s) filmed from copy borrowed from: Wellesley College

entire part

_____Other:_____

_____

TRACKING#: MSH02535

FILMED IN WHOLE
OR PART FROM A
COPY BORROWED
FROM:

WELLESLEY
COLLEGE

2.0 mm ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890

1.5 mm ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890

PM-MGP 13″x18″
METRIC GENERAL PURPOSE TARGET
PHOTOGRAPHIC

150 mm

100 mm

1.0

1.1

1.25

1.4

1.6

1.8

ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890

ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz
1234567890

ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz
1234567890

1.0 mm

1.5 mm

2.0 mm

2.5 mm

A5

A4

PRECISION℠ RESOLUTION TARGETS

Century

A&P

1303 Geneva Avenue
St. Paul, MN 55119

ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz
1234567890

4.5 mm

ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890

3.5 mm

U.S. CONGRESS SENATE

CONSOLIDATION OF RAILWAYPROPERITIES

Columbia University
in the City of New York

THE LIBRARIES

SCHOOL OF BUSINESS

CONSOLIDATION OF RAILWAY PROPERTIES

HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE COMMERCE
UNITED STATES SENATE

SEVENTIETH CONGRESS

FIRST SESSION

ON

S. 1175

A BILL TO PROMOTE THE UNIFICATION OF CARRIERS ENGAGED IN INTERSTATE COMMERCE, AND FOR OTHER PURPOSES

LIBRARY
THE
CHASE NATIONAL BANK
OF THE
CITY OF NEW YORK
RECEIVED APR 11 1928

PART 1

JANUARY 9th to 21st, 1928

Printed for the use of the Committee on Interstate Commerce

Bus.
D530.2
Un 3 3
pt 1

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON
1928

81538

Business

COMMITTEE ON INTERSTATE COMMERCE

JAMES E. WATSON, Indiana, *Chairman*

FRANK R. GOODING, Idaho.
JAMES COUZENS, Michigan.
SIMEON D. FESS, Ohio.
ROBERT B. HOWELL, Nebraska.
GUY D. GOFF, West Virginia.
W. B. PINE, Oklahoma.
FREDERIC M. SACKETT, Kentucky.
JESSE H. METCALF, Rhode Island.
COLEMAN DU PONT, Delaware.

ELLISON D. SMITH, South Carolina.
KEY PITTMAN, Nevada.
WILLIAM CABELL BRUCE, Maryland.
C. C. DILL, Washington.
BURTON K. WHEELER, Montana.
EARLE B. MAYFIELD, Texas.
HARRY B. HAWES, Missouri.
HUGO L. BLACK, Alabama.
ROBERT F. WAGNER, New York.

JOHN F. HAYES, *Clerk*

D 530.2
Un33 pt 1

CONTENTS

Statement of—	Page
Fullbright, R. C	141, 192
Hall, Hon. Henry C	26, 43
La Roe, jr., Wilbur	123
Moore, Samuel W	126
Thom, Alfred P	64, 91
Willard, Daniel	163

CONSOLIDATION OF RAILWAY PROPERTIES

MONDAY, JANUARY 9, 1928

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to call, at 10.30 o'clock a. m., in the committee room, Capitol Building, Hon. James E. Watson presiding.

Present: Senators Watson (chairman), Fess, Hawes, Pine, Sackett, Pittman, Brookhart, Black, and Wagner.

The committee had under consideration the following bill, which is here printed in full, as follows:

[S. 1175, Seventieth Congress, first session]

A BILL To promote the unification of carriers engaged in interstate commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate commerce act, as amended, is amended—

(1) By inserting after the enacting clause thereof the following heading:

"TITLE I.—REGULATION OF CARRIERS"

(2) By adding at the end of such act a new title to read as follows:

"TITLE II.—UNIFICATION OF CARRIERS

"DEFINITIONS

"SEC. 201. As used in this title—

"(1) The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession or the District of Columbia.

"(2) The term 'carrier' means—

"(a) A common carrier engaged in the transportation in interstate or foreign commerce of passengers or property wholly by railroad or partly by railroad and partly by water, within the continental United States, subject to Title I of this act;

"(b) A corporation having power to engage, or owning property used or held for use, in such transportation.

"(3) The term 'securities' includes shares, bonds, or other evidences of interest or indebtedness.

"(4) The term 'voting securities' includes all outstanding shares of capital stock (whether or not such shares have voting privileges), and includes all other outstanding securities the holders of which under the terms of a mortgage deed of trust or other contract have the right to vote upon any proposal involved in the plan approved by the commission under this title.

"DECLARATION OF POLICY

"SEC. 202. It is hereby declared to be the policy of Congress, in order that an adequate and efficient transportation service may be maintained in the United States and necessary weak and short lines be preserved, to authorize and encourage the unification, through any method specified in sections 203, 204, and 205 of this title, of the property of carriers into a number of strong, efficient, and well-balanced systems which will, as far as practicable, maintain the existing routes and channels of trade and commerce, and preserve, as between themselves, the advantages of effective competition in service, so that the properties of the carriers in each system shall ultimately be managed and operated and owned or controlled by a single corporation, economy be promoted, unnecessary duplications and wasteful competition eliminated, better service afforded, and the traffic moved at the lowest rates compatible with the maintenance of adequate and efficient transportation service. In order that this policy may be carried out the unification of the properties of carriers, directly or indirectly, otherwise than in accordance with the provisions of this title or of paragraph (2) of section 5, after the enactment of the railway consolidation act of 1928, shall be unlawful.

"UNIFICATION UNDER AUTHORITY OF THIS TITLE

"SEC. 203. (1) In order to bring about such unification two or more carriers shall have power to agree on a plan therefor to be carried out under the authority of this title.

"(2) The plan may provide for one or more of the following:

"(a) An acquisition by or transfer to one of the petitioning carriers or another corporation, by purchase, sale, exchange, lease, or otherwise, of all or a part, or the right to operate all or a part, of the properties and franchises of one or more carriers, and, if so desired, the disposition of all or a part of the remaining assets of any of such carriers.

"(b) A corporate merger or consolidation of two or more carriers into one of the petitioning carriers or any other carrier corporation.

"(c) An acquisition of securities, by purchase, sale, exchange, lease, or otherwise, issued by a carrier, if such acquistiion is proposed to be made as part of a plan to effect a unification under subdivision (a) or (b) of this paragraph.

"PROCEDURE

"SEC. 204. (1) Two or more carriers may petition the commission for the approval of a plan to be carried out under the authority of this title if the boards of directors of such carriers have entered into a joint agreement, under their respective corporate seals, proposing such plan. The petition shall set out the plan in such detail as the commission may require.

"(2) Such joint agreement shall set out—

"(a) The terms and conditions of the plan and the methods by which it is to be effected.

"(b) A statement of the financial plan and of the securities, if any, to be authorized and to be issued in carrying out such plan, the substantial rights, privileges, powers, and immunities granted or denied the holders of one class of shares that are not equally granted or denied the holders of any other class of shares, and the terms on which such securities are to be issued.

"(c) Such other provisions and details not inconsistent with this act as the boards of directors may deem necessary or appropriate, or as the commission may require.

"(3) Any such joint agreement shall be held to be entered into by the board of directors of any such carrier if a majority of the number of such directors in office vote therefor.

"(4) A copy of this joint agreement, entered into in accordance with the provisions of this section, shall be filed as a part of the petition.

"ACQUISITION OF SECURITIES BY A CARRIER

"SEC. 205. Any carrier, in order to bring about a unification through the securing of control by the acquisition of securities, in accordance with the policy declared in section 202, may petition the commission for the approval of a plan to be effected by the acquisition by such carrier of securities issued by any other carrier or carriers, if such plan has been adopted by the board of directors of

the petitioning carrier. Such petition shall set out the plan, including the terms, methods, and purpose of the proposed acquisition and the issue of any new securities that may be involved therein, in such detail as the commission may require.

"NOTICE AND HEARING

"SEC. 206. (1) The commission shall give reasonable notice of the time and place for a public hearing to each of the carriers filing, or joining in the filing of, a petition under this title, and to the governor of each State in which is located any part of the lines of any such carriers. Such carriers, and any governor so notified, or any representative of the State designated by him, and any other person having an interest, shall be afforded a reasonable opportunity to be heard.

"(2) In any proceeding upon a petition filed under this title the commission may, in its discretion, without separate hearing, take any action which it is authorized to take under the provisions of section 20a of this act; and in any proceeding upon a petition filed under section 204 the commission may, in its discretion, without separate hearing, take any action which it is authorized to take under the provisions of paragraphs (18), (19), or (20) of section 1 of this act.

"(3) Prior to or at the time a petition is called for hearing, but not thereafter except for good cause shown, any carrier may file with the commission an intervenor's petition praying that it be made a party to the proposed unification.

"ORDER OF THE COMMISSION

"SEC. 207. (1) If the commission finds that the provisions of this title have been complied with, and is of the opinion, after such hearing, that the public interest is adequate and efficient transportation service and the policy of Congress herein declared will be promoted thereby, the commission shall enter an order approving the plan, on the terms and conditions and by the methods set forth in the petition, or with such modifications thereof, or upon such terms, conditions, and methods as it may prescribe as necessary in the public interest. If the order of the commission (whether or not any intervenor's petition has been filed) imposes as a condition to the approval of the proposed unification that a carrier not joining in filing the petition be made a party to the unification, the carriers filing the petition may report to the commission the efforts made by them to comply with the condition; and if, after hearing, the commission is of opinion that the carrier is to be made a party is insisting on unreasonable terms, the commission may revoke or modify the conditions or prescribe the terms on which the carrier may be made a party to the proposed unification. In reaching any opinion or in making any determination in respect of the public interest, the commission shall not consider or pass upon the terms offered the holders of voting securities of the carriers filing, or joining in the filing of, the petition.

"(2) The carriers and the commission shall give due consideration to the inclusion in the plan of short and weak carriers in the territory involved; and in order that the policy declared in section 202 of this title may be carried out the commission is directed to make and have available for its use a study of the short and weak carriers.

"CONSENT OF CARRIERS

"SEC. 208. (1) The order of the commission under section 207 shall not become effective unless the board of directors and the holders of the voting securities of each of the carriers designated therein, or, in the case of a petition under section 205, the board of directors of the petitioning carrier consent thereto.

"(2) A board of directors of a carrier shall be held to have consented thereto if a majority of the number of such directors in office vote for the adoption of the plan as approved.

"(3) The holders of the voting securities of any such carrier shall be held to have consented thereto if at least two-thirds of the votes cast by the holders of such outstanding voting securities who are present in person or by proxy at the meeting at which the adoption of the plan is voted upon are in favor of the adoption of the plan as approved, or, in the case of a subsidiary, if the provisions of paragraph (4) are complied with. Such votes may be cast in person or by proxy at an annual or special meeting held and conducted, and notice of which has been given, in any manner lawful for an annual or special meeting (as the case may be) of the stockholders of such carrier. The number of votes which any such holder is entitled to cast at any such meeting shall be determined as follows:

"(a) The holder of any such security entitled to vote in respect thereof in the election of directors of the carrier shall have the right to cast the same number of votes in respect thereof as he would be entitled to cast in such election.

"(b) The holder of any such security entitled, under the terms of a mortgage, deed of trust, or other contract, to vote in respect thereof upon any proposal involved in the plan as approved shall have the right to cast, upon the adoption of the plan as approved, the same number of votes in respect of such security as he would be entitled to cast upon the determination of such proposal.

"(c) The holder of any share of outstanding capital stock not entitled to vote in respect thereof under subdivision (a) or (b) of this paragraph shall have the right to cast, upon the adoption of the plan as approved, one vote in respect of such share.

"(4) In the case if any subsidiary all the voting securities of which are held by another carrier, the holders of the voting securities of such subsidiary shall be held to have consented thereto if a majority of the number of the directors of such other carrier in office vote for the adoption of the plan as approved.

"(5) A certificate for each carrier, under its corporate seal, signed by its president or one of its vice presidents, and attested by its secretary or an assistant secretary, and duly acknowledged before a notary public by such president or vice president and secretary or assistant secretary, that its board of directors, and, when required, the holders of its voting securities have so consented, shall be filed with the commission and shall be prima facie evidence of the facts so certified.

"EFFECTIVE DATE OF ORDER OF THE COMMISSION

"SEC. 209. The order of the commission approving such plan shall become effective upon the certification by the commission that the board of directors and the holders of the voting securities of each of the carriers designated therein have consented thereto in the manner provided in section 208.

"EFFECT OF ORDER OF THE COMMISSION

"SEC. 210. (1) On and after the effective date of the order of the commission approving such plan, or of an order of the commission (whether entered before or after the enactment of this title) approving an acquisition of control, each carrier designated in any such order shall have authority and power necessary or appropriate to carry into effect, and to do any and all acts necessary or appropriate in order to carry into effect, such plan or acquisition, in accordance with such order; and such carrier and its officers and directors shall be relieved from the operation of the 'antitrust laws' as designated in section 1 of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and the operation of the first sentence of paragraph (12) of section 20a of this act; from all other restraints and prohibitions of any other law of the United States; and from all restraints or prohibitions of the laws or constitution of any State or any decision or order of any State authority—in so far as may be necessary or appropriate to enable such carrier and its officers and directors to enter into and carry into effect such plan, or to make such acquisition, or in accordance with such plan to hold, maintain, and operate any properties and exercise any franchises, whether originally its own or acquired by it pursuant to such plan.

"(2) If the plan provides for an acquisition by or transfer to one of the petitioning carriers or another corporation as referred to in subdivision (a) of paragraph (2) of section 203, such acquiring carrier or corporation, on and after the effective date of the order of the commission, shall have power, in accordance with the terms and conditions and by the methods, if any, set forth in such order, to issue, sell, or exchange securities in accordance with the order of the commission; to hold, maintain, and operate any properties, and to exercise any franchises, acquired by it pursuant to such plan; to carry on and to do any business authorized by its franchises, whether originally its own or acquired by it pursuant to such plan, and generally shall have all other powers necessary or appropriate to carry into effect in all respects the plan approved by the commission.

"(3) If the plan provides for a corporate consolidation or merger of two or more carrier corporations to be effected under the authority of this title, such corporations, on and after the effective date of the order of the commission, shall be held to be consolidated or merged, and the constituent corporations and the resulting corporation may proceed to carry out the details thereof in accordance with such order, and the resulting corporation shall have authority and power necessary or appropriate to carry into effect, and to do any and all acts necessary or appropriate in order to carry into effect, such plan, to exercise its franchises, and to transact and carry on business in accordance therewith.

"(4) The entry of any order by the commission under this title and the certification by the commission under section 209 shall be conclusive evidence that the carriers designated in such order, and their boards of directors and holders of voting securities, have complied with the provisions of this title which are applicable to such carriers, boards of directors, and holders of voting securities and which are conditions precedent to the entry of such order and such certification.

"(5) The title to, or right or interest in, real estate, vested by deed or otherwise in any carrier designated in the order of the commission, shall not be held to revert or to be in any way impaired by reason of this title of this act or of anything done under the provisions of this title of this act or an order of the commission entered thereunder.

"EFFECT OF CORPORATE CONSOLIDATION UNDER THIS TITLE

"SEC. 211. (1) Upon the effective date of the order of the commission in the case of a plan presented for a corporate consolidation or merger of two or more carrier corporations (hereinafter referred to as the 'constituent corporations') into one corporation (hereinafter referred to as the 'resulting corporation'), effected under the authority of this title, and except as restricted or limited in the original or modified joint agreement, or in the petition, or in the order of the commission—

"(a) The resulting corporation shall have all and singular the rights, privileges, powers, immunities, exemptions, and franchises of each of the constituent corporations;

"(b) The resulting corporation, in accordance with the terms and conditions and by the methods set forth in such order, shall have power to issue, sell, or exchange securities;

"(c) All property, real and personal, and all debts due on whatever account, including stock subscriptions and other things in action, belonging to any of the constituent corporations shall be held to be transferred to and vested in the resulting corporation without further act or deed, as effectually as they were vested in the constituent corporation;

"(d) All debts, liabilities, and duties of each of the constituent corporations shall thenceforth attach to the resulting corporation, and become and be its debts, liabilities, and duties, and be enforceable against it to the same extent as if such debts, liabilities, and duties had been incurred or contracted by it.

"(2) In the case of any such consolidation or merger effected under the authority of this title, the rights of creditors and all liens upon the property of any of the constituent corporations shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence so far as may be necessary to preserve the same.

"(3) Any action or proceeding pending by or against any such constituent corporation may be prosecuted to judgment as if such consolidation had not been effected, but the resulting corporation may, upon its motion, be made a party thereto.

"DISSENTING SECURITY HOLDERS

"SEC. 212. (1) In the case of any plan proposed by two or more carriers under section 203, any holder of a voting security issued by any carrier a party to the plan who did not vote for the adoption of the plan, may, within ninety days after the annual or special meeting at which the holders of the voting securities of such carrier consented thereto, give notice in writing to such carrier that he does not assent, except that if any holder of any such voting security, at the time such vote is taken, is under a legal disability, and if at such time there is no legal representative duly authorized to vote in respect of such security, then such notice may be given at any time prior to the expiration of ninety days from the date on which such disability is removed or the date on which a legal representative is duly authorized to act for such holder, whichever date is the earlier. If such notice in respect of any such voting security is not received by such carrier within such time, the holder of such security shall be held to have consented to such order.

"(2) Any voting security issued by any carrier, a party to a plan under section 203, and held by any such nonassenting holder who, under the terms under which such security was issued, the charter or articles of incorporation of such carrier, or the provisions of law applicable thereto, is not bound by the vote by which the plan was adopted, shall, if the plan involves the retirement of his security or the surrender of his security in exchange for any other security, be purchased by the corporation which is to manage and operate and own or control the properties, or, if for any reason not so purchased, shall be acquired by condemnation by such corporation, in accordance with the provisions of section 213.

"RIGHT OF EMINENT DOMAIN

"SEC. 213. (1) The corporation authorized to acquire by condemnation the securities of any nonassenting holder, under the provisions of section 212, shall, unless the securities are purchased pursuant to section 212, institute proceedings, in the United States district court for a judicial district within a State in which the carrier which issued the securities is chartered, for the condemnation of such securities. Thereupon the court shall transmit, under its seal, the petition, or a copy thereof, to the Interstate Commerce Commission, for an inquiry and report to the court of the just compensation to be paid therefor.

"(2) If such corporation fails to purchase or to institute and maintain condemnation proceedings, any such nonassenting holder or, if under a legal disability his legal representative, may, after the expiration of six months from the date on which notice to the carrier was given, in accordance with paragraph (1) of section 212, institute in his behalf proceedings for the condemnation by the corporation of the voting securities held by him. Such proceedings shall be had in the court which would have had jurisdiction of such proceedings if instituted by the corporation. All costs attaching to such proceedings shall be assessed against the corporation.

"(3) Any corporation authorized by an order of the commission entered under this title to acquire any property other than securities, or any right or interest in any such property, held or enjoyed without power of assignment or transfer, may institute proceedings in the United States District Court for the judicial district in which such property is located, or of which the owner of such property right, or interest is an inhabitant, for the condemnation of such property, right, or interest. Thereupon the court shall transmit, under its seal, the petition, or a copy thereof, to the Interstate Commerce Commission, for an inquiry and report to the court of the just compensation to be paid therefor. If such property is located in the District of Columbia, application may be made to the Supreme Court of the District of Columbia.

"(4) The United States District Courts and the Supreme Court of the District of Columbia are hereby given jurisdiction to hear and determine proceedings for condemnation instituted under this section, and to enter appropriate orders of condemnation therein, and it shall be the duty of the commission, upon receipt of any such petition, or a copy thereof, from any such court, to ascertain the just compensation to be paid for any such securities, or any such property, right, or interest, and to report thereon to the court.

"(5) The practice, pleadings, forms, and modes of procedure for proceedings for condemnation under this section shall conform as nearly as may be to the practice, pleadings, forms, and modes of proceedings in suits in equity, and the powers of the courts of the United States to prescribe rules for proceedings shall apply to proceedings for condemnation under this section to the same extent as they apply to suits in equity; except that—

"(a) All, or any number of, the nonassenting holders of voting securities issued by any one carrier, or their legal representatives, may be jointed in one proceeding;

"(b) Notice of any such petition shall be given the holders of the securities, or their legal representatives, or the owners of the property or the right and interest therein to be condemned either by personal service, or, if for good cause shown permitted by the court, by publication at least once a week for four successive weeks in a newspaper published in the judicial district or in the District of Columbia (as the case may be);

"(c) Reasonable notice and opportunity to be heard shall be afforded each such holder, legal representative, or owner by the commission, in such manner as the commission or the court may prescribe;

"(d) The report of the commission shall be treated by the court and proceeded on in the same manner as the report of a master in chancery in a suit in equity.

"(6) Upon the payment of the amount of the award, or in the case of refusal to receive the amount, then upon the deposit thereof with the clerk of the court, the security or property or the right or interest therein shall be held to be transferred to the petitioning carrier or corporation and to have become its security property, right, or interest. In case of failure to pay the amount awarded within six months after the judgment or decree making the award has become final and upon the deposit with the clerk of the court of such security properly assigned or the documents properly transferring such property, right, or interest, final process to execute the award may be had by writ of execution in the form used by the court in suits of common law in actions of assumpsit.

"TAXATION

"SEC. 214. No tax shall be levied or collected under any revenue law of the United States, or by or under the authority of any State or any political subdivision thereof, in respect of any issuance, sale, delivery, or transfer of any security or any agreement to sell, or memorandum of sale of, any security, or any grant, assignment, transfer, or other conveyance of any interest in real or personal property, in respect of the incorporation or reincorporation of any carrier, or in respect of any other means or proceeding necessary or appropriate to carry a unification into effect, if in pursuance of a unification approved by the commission under this title. Gain from the sale or other disposition of property, or income from any distribution, in connection with any such unification, shall not be subject to tax by or under the authority of any State or any political subdivision thereof. Any such unification shall be held to be a reorganization within the meaning of that term as used in Part I of Title II of the revenue act of 1926.

"APPLICATION OF EXISTING LAWS

"SEC. 215. (1) The provisions of section 20a, other than those of paragraph (10), shall not apply to any issuance of securities, or the assumption of any obligation or liability in respect of any securities, if authorized by, and in accordance with the terms and conditions of, an order of the commission issued under this title approving a plan.

"(2) The provisions of paragraphs (18), (19), and (20) of section 1 shall not apply to any extension, enlargement, or abandonment of properties, if authorized by, and in accordance with the terms and conditions of, an order issued by the commission under this title, approving a plan, nor shall such paragraphs apply to any construction, acquisition, or operation of lines or transportation over such lines, in pursuance of the extension, enlargement, or abandonment.

"(3) Any of the evidence included in the record of the commission in its proceedings under paragraph (2), (4), or (5) of section 5 and any abstract or written materials made by the commission and based upon such evidence, shall be preserved and shall be available to and may be used by the commission in its proceedings upon a petition filed under this title; but any such evidence, abstract, or materials so used shall, by reference or otherwise, be made a part of its record in such proceedings.

"SEC. 216. Paragraph (2) of section 5 of the interstate commerce act is amended by adding at the end thereof the following new sentence: 'If an application under this paragraph proposes an acquisition authorized under the provisions of Title II of this act, the commission may, if it is of opinion that the public interest so requires, make it a condition of its further consideration of the application that the applicant conform to and proceed under the provisions of such title.'

"SEC. 217. Upon the expiration of seven years from the passage of the railway consolidation act of 1928, it shall be the commission to report to Congress the extent to which unifications have taken place in accordance with such act, and, in the light of conditions then existing, its recommendations as to further proceedings.

"SEC. 218. Paragraphs (4), (5), and (6) of section 5 are hereby repealed.

"SEPARABILITY OF PROVISIONS

"SEC. 219. If any provision of this title is declared unconstitutional, or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the title and of the application of such provision to other persons and circumstances shall not be affected thereby."

SHORT TITLE

SEC. 2. This act may be cited as the "Railway consolidation act of 1928."

The CHAIRMAN. The committee will come to order. This is Monday morning and it is a little difficult to get the Senators to attend, because they desire to answer their correspondence. We have five here at this time, and while that number will be considered as constituting a quorum, it takes, under the rules of the committee, seven members before a vote can be had on any question. Under the circumstances I shall not wait longer but will proceed.

Mr. Commissioner Hall, representing the Interstate Commerce Commission, will be the first witness. Mr. Hall is not in the best of health and desires to conclude his remarks this morning, if that is possible, and therefore we will give him the right of way.

Mr. THOM. Mr. Chairman, before Mr. Hall begins his testimony I should like to explain that on the 3d of last March Mr. Parker, chairman of the House Committee, introduced in the House an amended bill differing from his previous bill introduced by the introduction of certain amendments which had been tentatively considered by the House committee, and he made an address which was published in the Congressional Record in which he invited study of that latest bill and any criticisms or suggestions that might occur to anyone in respect to it—all to be done within the vacation of Congress.

As soon as that was done the law committee of the Association of Railway Executives undertook that study. That committee consists of about 35 or 40 general counsel of the several railroads of the country, and they appointed a drafting committee to study the subject and to report back its suggestions to the law committee.

The CHAIRMAN. Had not that committee given previous consideration to this question time and again?

Mr. THOM. Oh, yes; but this was a new suggestion.

That drafting committee consisted of Judge Lovett, of the Union Pacific, with whom, as general counsel, Mr. H. W. Clark acted; Mr. Bledsoe, of the Atchison; Mr. Cary, of the New York Central, during whose absence for a time Mr. A. H. Harris of that company acted; Mr. Blair, of the Southern Pacific, and myself.

We studied the subject as thoroughly as we could and on the 15th day of November made a report to the law committee. The report of the drafting committee was somewhat amended, not in any essential particulars, and thereupon, when Senator Fess introduced his bill at this session, I undertook to have a print made of the Fess bill with the amendments suggested by the law committee, inclosing in brackets that part of the Fess bill which we suggested should be amended and in italics that part of it which we suggested should be added. That was accompanied by a clean print of the bill as it would read if all those suggestions were accepted.

I have that print here and wish to introduce it for the consideration of the committee and would say that I have furnished copies of that bill to the Interstate Commerce Commission, to the National Industrial Traffic League, to the Short Line Railroad Association, and to anybody else that seemed interested in the matter, so that it has been in circulation some time and has been under consideration by these various interests. I brought 25 copies here this morning and will be glad to have them presented.

(The document referred to is as follows:)

S. 4892. RAILWAY CONSOLIDATION BILL SHOWING AMENDMENTS PROPOSED BY THE LAW COMMITTEE OF THE ASSOCIATION OF RAILWAY EXECUTIVES NOVEMBER 15, 1927

[NOTE.—Matter proposed to be stricken out is shown in [ ]. Matter proposed to be inserted is shown in *italics*]

[S. 4892, Sixty-ninth Congress, second session]

A BILL To promote the unification of carriers engaged in interstate commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interstate commerce act, as amended, is [amended—

(1) By inserting after the enacting clause thereof the following heading:

"TITLE I.—REGULATION OF CARRIERS"

(2) By adding at the end of such act a new title to read as follows:

"TITLE II.—UNIFICATION OF CARRIERS]

amended by inserting after the enacting clause thereof the following heading:

"TITLE I.—REGULATORY PROVISIONS—GENERAL"

Sec. 2. The interstate commerce act, as amended, is amended by adding at the end thereof a new title to read as follows:

"TITLE II.—REGULATORY PROVISIONS—UNIFICATION OF CARRIERS

"DEFINITIONS

"SEC. 201. As used in this title—

"(1) The term 'interstate or foreign commerce' means commerce between any *place in a* State, Territory, or possession *of the United States,* or the District of Columbia, and any place outside thereof; or between points within the same State[, Territory, or possession,] or *within* the District of Columbia, but through any place outside thereof; or within [any Territory or possession or] the District of Columbia.

"(2) The term 'carrier' [means—

"(a) A] *means* (*a*) *a* common carrier engaged in the transportation in interstate or foreign commerce of passengers or property wholly by railroad or partly by railroad any partly by water, within the continental United States, subject to Title I of this act;

[" (b) A corporation having power to engage, or owning property used or held for use, in such transportation.]

"(*b*) *A railroad or terminal corporation, even though not engaged in such transportation, which owns property used or held for use in such transportation; and*

(*c*) *A corporation organized to effect a unification under this title and for the purpose of engaging in transportation by railroad subject to this act; but does not include sleeping-car companies or express companies.*

"(3) The term 'securities' includes shares *of capital stocks,* bonds, or other evidences of interest or indebtedness *issued by a carrier.*

"(4) The term ['voting securities' includes] *'stock' means* all outstanding shares of capital [stock (]*stock,* whether or not such shares have voting privileges.[), and includes all other outstanding securities the holders of which under the terms of a mortgage deed of trust or other contract have the right to vote upon any proposal involved in the plan approved by the commission under this title.

"DECLARATION OF POLICY

"SEC. 202. It is hereby declared to be the policy of Congress, in order that an adequate and efficient transportation service may be maintained in the United States and necessary weak and short lines be preserved, to authorize and encourage the unification, through any method specified in section 203, 204, or 205 of this title, of the property of carriers into a number of strong, efficient, and well-

balanced systems which will, as far as practicable, maintain the existing routes and channels of trade and commerce, and preserve, as between themselves, the advantages of effective competition in service, so that the properties of the carriers in each system shall ultimately be managed and operated and owned or controlled by a single corporation, economy be promoted, unnecessary duplications and wasteful competition eliminated, better service afforded, and the traffic moved at the lowest rates compatible with the maintenance of adequate and efficient transportation service. In order that this policy may be carried out, the unification of the properties of carriers, directly or indirectly, otherwise than in accordance with the provisions of this title or of paragraph (2) of section 5, after the enactment of the railroad consolidation act of 1926, shall be unlawful.]

"Authority for Unifications

"Sec. 202. (1) The unification through any method or procedure provided for in this title, of carriers or property of carriers, is hereby authorized, and the commission shall carry out the provisions of this title in such manner as in its opinion will protect the public interest, preserve necessary weak or short lines, prevent any undue lessening of existing carrier competition in service in cases where such competition is deemed by it essential to the public interest, and bring about ultimately the establishment of a number of strong, efficient, and well balanced systems, calculated to facilitate simplified and more effective regulation, to promote economy, to afford better service, to maintain as far as practicable the existing routes and channels of trade and commerce, to eliminate unnecessary duplications and wasteful competition and to provide the advantages of competition between the systems so established.

"(2) The unification of carriers or any of the railway properties of carriers, directly or indirectly, after the enactment of the railway consolidation act of 1928, shall be unlawful, unless such unification is in accordance with the provisions of this title or with an order of the commission under paragraph (2) of section 5; but the provisions of this title shall not be held to prohibit, in the exercise of any power conferred by State authority and in accordance with State law, (a) the acquisition by any carrier of securities issued by another carrier in an amount not sufficient to constitute control of such other carrier, or (b) the acquistion by a carrier of additional securities issued by another carrier of which control has been previously lawfully acquired, or (c) the formation of a subsidiary corporation, and the acquisition of all or any part of the securities thereof, for the construction, use, ownership, or control of branches, terminals, or other property.

"UNIFICATION UNDER AUTHORITY OF THIS TITLE

"SEC. 203. (1) In order to bring about such unification, two or more carriers shall have power to agree on a plan therefor to be carried out under the authority of this title.

"(2) The plan may provide for one or more of the following;

"(a) An acquisition by or transfer to one of the petitioning carriers or [another corporation] *to any other carrier*, by purchase, sale, exchange, lease, or otherwise, of all or a part, or the right to operate all or a part, of the properties and franchises of one or more carriers, and if so desired, the disposition of all or a part of the remaining assets of any [of] such carriers.

"(b) A corporate merger [or consolidation] *of the properties, rights, and franchises* of [two] *one* or more carriers into one of the petitioning carriers or any other carrier corporation.

"*(c) A corporate consolidation of the properties, rights, and franchises of two or more carriers into a single corporation.*

"[(c)] *(d)* An acquisition of securities[,] by purchase, [sale,] exchange, lease, or otherwise, issued by a carrier, if such acquisition is proposed to be made as part of a plan to effect a unification [under subdivision (a) or (b) of this paragraph].

"*(3) Nothing in this title shall be construed to authorize or provide for the creation, directly or indirectly, of any Federal or National corporation; and all the powers, rights, privileges, and franchises granted by this act to any corporation now existing or hereafter created are, and shall be deemed to be, supplementary and in addition to, or in modification of, the powers, rights, privileges, and franchises of such corporation granted by its charter, or existing under the laws by virtue of which it was or may be created.*

[PROCEDURE] *"JOINT AGREEMENT AND PETITION*

"SEC. 204. (1) Two or more carriers may petition the commission for the approval of a plan to be carried out under the authority of this title if the boards of directors of such carriers have [entered into] *authorized* a joint agreement, under their respective corporate seals, proposing such plan. The peition shall set out the plan in such detail as the commission may require. *Any such petition or plan may be amended at any time by leave of the commission.*

"(2) Such joint agreement shall set out—

"(a) The terms and conditions of the plan and the methods by which it is to be effected.

"(b) A statement of the financial plan and of the sesurities, if any, to be authorized and to be issued in carrying out such plan, the substantial rights, privileges, powers, and immunities granted or denied the holders of one class of shares that are not equally granted or denied the holders of any other class of shares, and the terms on which such securities are to be issued.

"(c) Such other provisions and details not inconsistent with this [act] *title* as the boards of directors may deem necessary or appropriate, or as the commission may require.

"(3) Any such joint agreement shall be held to be [entered into] *authorized* by the board of directors of any such carrier if a majority of the number of such directors in office vote therefor.

"(4) A copy of the joint agreement, entered into in accordance with the provisions of this section, shall be filed as a part of the petition.

"ACQUISITION OF SECURITIES BY A CARRIER

"SEC. 205. *(1)* Any carrier, in order to bring about a unification through [the securing of control by] the acquisition of securities, [in accordance with the policy declared in section 202,] may petition the commission for the approval of a plan to be effected by the acquisition by such carrier of securities issued by any other carrier or carriers, if such plan has been adopted by the board of directors of the petitioning carrier. Such petition shall set out the plan, including the terms, methods, and purpose of the proposed acquisition and the issue of any new securities that may be involved therein, in such detail as the commission may require. *Such plan shall be held to be adopted by the board of directors of the petitioning carrier if a majority of the number of such directors in office vote therefor.*

"(2) The commission may, upon the application of any carrier which is the owner of any of the securities issued by another carrier, and after hearing, by order approve and authorize the acquisition of additional securities issued or to be issued by such other carrier, under such rules and regulations and for such consideration and on such terms and conditions as it may prescribe.

"NOTICE AND HEARING

"SEC. 206. (1) The commission shall give reasonable notice of the time and place for a public hearing to each of the carriers filing, or joining in the filing of, a petition under this title, and to the governor of each State in which is located any part of the lines of any of such carriers. Such carriers, and any governor so notified, or any representative of the State designated by him, and, *subject to such rules as the commission may prescribe*, any other person having an interest, shall be afforded a reasonable opportunity to be heard.

"(2) In any proceeding upon a petition filed under this title the commission may, at its discretion, without separate hearing, take any action which it is authorized to take under the provisions of section 20a of this act; and in any proceeding upon a petition filed under section 204 the commission may, in its discretion, without separate hearing, take any action which it is authorized to take under the provisions of paragraphs (18), (19), or (20) of section 1 of this act.

"(3) Prior to or at the time a petition is called for hearing, but not thereafter except for good cause shown, any carrier may file with the commission an intervenor's petition praying that it be made a party to the proposed unification.

"ORDER OF THE COMMISSION

[*"SEC. 207 (1) If the commission finds that the provisions of this title have been complied with, and is of the opinion, after such hearing, that the public interest is adequate and efficient transporation service and the policy of Congress herein declared will be promoted thereby, the]*

"*Sec. 207. (1) If, after such hearing, the commission is of the opinion that the proposed unification will be in accordance with the provisions of section 202, and finds that such provisions of this title as are conditions precedent to the entry of the order have been complied with, the* commission shall enter an order approving the plan, on the terms and conditions and by the methods set forth in the petition, or with such modifications thereof, or upon such terms, conditions, and methods, as it may prescribe as necessary in the public interest[.], *and also, if the commission shall find upon objection of a stockholder of a carrier, a party to the proposed plan of unification, that certain terms and conditions of said plan subject such stockholder to undue or unreasonable prejudice, then with such modifications of the plan, or upon such terms, conditions and methods, as it may prescribe as necessary to remove or correct such prejudice.* If the order of the commission (whether or not any intervenor's petition has been filed) imposes as a condition to the approval of the proposed unification that a carrier not joining in filing the petition be made a party to the unification, the carriers filing the petition may report to the commission the efforts made by them to comply with the condition; and if, after hearing, the commission is of opinion that the carrier that is to be made a party is insisting on unreasonable terms, the commission may revoke or modify the condition [or] *or, if requested to do so by such carrier, may* prescribe the terms on which the carrier may be made a party to the proposed unification. [In reaching any opinion or in making any determination in respect of the public interest, the commission shall not consider or pass upon the terms offered the holders of voting securities of the carriers filing, or joining in the filing of, the petition.]

"(2) The carriers and the commission shall give due consideration to the inclusion in the plan of short and *of* weak carriers in the territory involved; and in order that [the policy declared in] *the provisions of* section 202 [of this title] may be carried out, the commission is directed to make and have available for its use, a study of the short and weak carriers, *but without postponing for the purpose of any general study the consideration of and action upon any plan proposed under this title.*

"*(3) The issue of securities under or in connection with any plan of corporate consolidation or merger shall be subject to the provisions of section 20a of this act, but such provisions may be administered as provided in paragraph (2) of section 206.*

"*(4) The commission may from time to time, for good cause shown, upon the petition of a carrier (or of its successor in interest) which, under the plan, acquires the property of another carrier, make such orders, supplemental to any order issued under this title, as it may deem necessary or appropriate.*

"CONSENT OF CARRIERS

"SEC. 208. (1) The order of the commission under section 207 shall not become effective unless the board of directors and the holders of the [voting securities] *stock* of each of the carriers designated therein, or, in the case of [a petition under section 205, the board of directors of the petitioning] *an acquisition of securities under section 205 or under subdivision (d) of paragraph (2) of section 203, the board of directors of the acquiring* carrier, consent thereto.

"(2) [A] *The* board of directors of a carrier shall be held to have consented thereto if a majority of the number of such directors in office vote for the adoption of the plan, as approved.

"(3) The holders of the [voting securities] *stock* of any such carrier shall be held to have consented thereto if at least [two thirds of the votes cast by the holders of such outstanding voting securities who are present in person or by proxy at the meeting at which the adoption of the plan is voted upon, are] *a majority of the votes to which the holders of all outstanding shares of capital stock are entitled are cast* in favor of the adoption of the plan as approved [or, in the case of a subsidiary, if the provisions of paragraph (4) are complied with]. Such votes may be cast, in person or by proxy, at an annual or special meeting held and conducted, and notice of which has been given, in any manner lawful for an annual or special meeting (as the case may be) of the stockholders of such carrier. The number of votes which any such [holder] *stockholder* is entitled to cast at any such meeting shall be determined as follows:

"(a) The holder of any such [security] *stock* entitled to vote in respect thereof in the election of directors of the carrier, shall have the right to cast the same number of votes in respect thereof as he would be entitled to cast in such election, *except that there shall be no right of cumulative voting.*

["(b) The holder of any such security entitled, under the terms of a mortgage, deed of trust, or other contract, to vote in respect thereof upon any proposal involved in the plan as approved shall have the right to cast, upon the adoption of the plan as approved, the same number of votes in respect of such security as he would be entitled to cast upon the determination of such proposal.]

"[(c)](*b*) The holder of any share of outstanding capital stock not entitled to vote in respect thereof under subdivision (a) [or (b)] of this paragraph shall have the right to cast, upon the *question of the* adoption of the plan as approved, one vote in respect of *each* such share.

["(4) In the case of any subsidiary all the voting securities of which are held by another carrier, the holders of the voting securities of such subsidiary shall be held to have consented thereto if a majority of the number of the directors of such other carrier in office vote for the adoption of the plan, as approved.]

"[(5)] (*4*) A certificate for each carrier, under its corporate seal, signed by its president or one of its vice presidents, and attested by its secretary or an assistant secretary, and duly acknowledged before a notary public by such president or vice president and secretary or assistant secretary, that its board of directors and, when required, the holders of its [voting securities] *stock* have [so] consented *thereto,* shall be filed with the commission and shall be prima facie evidence of the facts so certified.

"*(5) Notwithstanding any covenant or provision in any mortgage, deed of trust or other contract heretofore or hereafter made by a carrier, a party to a plan of unification under this title, prohibiting a merger or consolidation of such carrier or a sale or lease of its properties, or requiring the consent thereto of holders of bonds, debentures or other evidences of indebtedness issued under such mortgage, deed of trust or other contract, or of the trustee therein named, such prohibition shall not prevent, nor shall such consent be necessary to, the approval by the commission or the carrying into effect of such plan of unification as approved, and no default shall result, whereby there shall arise or be enforced a right to declare such bonds, debentures or other evidences of indebtedness immediately due and payable or to enter upon the mortgaged property or to sell or foreclose any security or to take any other action provided by such mortgage, deed of trust or other contract, by reason of the carrying into effect of such plan of unification despite such prohibition or without such consent; it being hereby declared that all such covenants and provisions to the extent that they tend to hinder or prevent any unification of carriers under the authority of this title are contrary to the public interest.*

"EFFECTIVE DATE OF ORDER OF THE COMMISSION

"SEC. 209. The order of the commission approving such plan shall become effective upon the certification by the commission that the board of directors [and the holders of the voting securities] *and, when required, the holders of the stock* of each of the carriers designated therein have consented thereto in the manner provided in section 208.

"EFFECT OF ORDER OF THE COMMISSION

"SEC. 210. (1) On and after the effective date of the order of the commission approving such plan, or of an order of the commission (whether entered before or after the [enactment of this title] *passage of the Railway Consolidation Act of 1928*) approving an acquisition of control, each carrier designated in any such order, *in accordance with such order,* shall have authority and power necessary or appropriate to carry into effect, and to do any and all acts necessary or appropriate in order to carry into effect, such plan or [acquisition, in accordance with such order; and] *acquisition; to issue, sell, or exchange securities, in accordance with the terms and conditions and by the methods, if any, set forth in such order; to hold, maintain and operate any properties acquired by it pursuant to such plan; and to exercise its franchises, and to carry on and to do any business authorized by its franchises, whether theretofore its own or acquired by it pursuant to such plan.*

"(*2*) *Any* such carrier and its [officers and directors] *officers, directors, agents, and employees* shall be relieved from the operation of the 'antitrust laws' as designated in section 1 of the act entitled 'An act [to] *To* supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and the operation of the first sentence of paragraph (12) of section 20a of this act; from all other restraints and prohibitions of any other law of the United States; and from all restraints or prohibitions of the laws or constitution of any State or any decision or order of any State authority—in so far as may be necessary or appropriate to enable such carrier and its

[officers and directors] *officers, directors, and agents* to enter into and carry into effect such plan, [or] *and* to make such acquisition, or in accordance with such plan to hold, maintain, and operate any properties and exercise any franchises, whether [originally] *theretofore* its own or acquired by it pursuant to such plan.

[“(2) If the plan provides for an acquisition by or transfer to one of the petitioning carriers or another corporation as referred to in subdivision (a) of paragraph (2) of section 203, such acquiring carrier or corporation, on and after the effective date of the order of the commission, shall have power, in accordance with the terms and conditions and by the methods, if any, set forth in such order, to issue, sell, or exchange securities in accordance with the order of the commission; to hold, maintain, and operate any properties, and to exercise any franchises, acquired by it pursuant to such plan; to carry on and to do any business authorized by its franchise, whether originally its own or acquired by it pursuant to such plan, and generally shall have all other powers necessary or appropriate to carry in to effect in all respects the plan approved by the commission.

“(3) If the plan provides for a corporate consolidation or merger of two or more carrier corporations to be effected under the authority of this title, such corporations on and after the effective date of the order of the commission, shall be held to be consolidated or merged, and the constituent corporations and the resulting corporation may proceed to carry out the details thereof in accordance with such order, and the resulting corporation shall have authority and power necessary or appropriate to carry into effect, and to do any and all acts necessary or appropriate in order to carry into effect, such plan, to exercise its franchises, and to transact and carry on business in accordance therewith.]

“[(4)](*3*) The entry of any order by the commission under this title and the certification by the commission under section 209 shall be conclusive evidence that the carriers designated in such order, and their boards of directors and [holders of voting securities] *stockholders*, have complied with the provisions of this title which are applicable to such carriers, boards of directors, and [holders of voting securities] *stockholders* and which are conditions precedent to the entry of such order and such certification.

“[(5)](*4*) The title to, or right or interest in, real estate, vested by deed or otherwise in any carrier designated in the order of the commission, shall not be held to revert or to be in any way impaired by reason of this title of this act or of anything done under the provisions of this title of this act or an order of the commission entered thereunder.

“EFFECT OF CORPORATE CONSOLIDATION [UNDER THIS TITLE] *AND MERGER*

“SEC. 211. (1) Upon the effective date of the order of the commission in the case of a plan presented for a corporate consolidation [or merger] of two or more carrier corporations ([hereinafter] referred to *in this title* as the ‘constituent corporations’) into [one] *a single* corporation ([hereinafter] referred to *in this title* as the ‘resulting corporation’), [effective under the authority of this title and] except as restricted or limited in the [original or modified] joint agreement, or in the petition, *as approved or granted by*, or in the order [of] *of*, the commission—

“(*a*) *The corporations shall be held to be consolidated;*

“[(a)](*b*) The resulting corporation shall have all and singular the rights, privileges, powers, immunities, exemptions, and franchises of each of the constituent [corporations;] *corporations, respectively, but only to the same extent as possessed or enjoyed by, and to be possessed and enjoyed only within the same territory as in the case of, each such constituent corporation;*

[“(b) The resulting corporation, in accordance with the terms and conditions and by the methods set forth in such order, shall have power to issue, sell, or exchange securities;]

“(c) All property, real and personal, and all debts due on whatever account, including stock subscriptions and other things in action, belonging to any of the constituent corporations shall be held to be transferred to and vested in the resulting corporation without further act or deed, as effectually as they were vested in the constituent corporation;

“(d) All debts, liabilities, and duties of each of the constituent corporations shall thenceforth attach to the resulting corporation, and become and be its debts, liabilities, and duties, and be enforceable against it to the same extent as if such debts, liabilities, and duties had been incurred or contracted by *or imposed upon* it.

“(2) Upon the effective date of the order of the commission in the case of a plan presented for a corporate merger of one or more carriers (referred to in this title as the ‘merging corporations’) into one of the petitioning carriers or any other carrier corporation (referred to in this title as the ‘continuing corporation’), except as restricted or limited in the joint agreement, or in the petition, as approved or granted by, or in the order of, the commission—

“(a) The corporations shall be held to be merged into the continuing corporation;

“(b) The continuing corporation shall have all and singular the rights, privileges, powers, immunities, exemptions, and franchises of each of the merging corporations, respectively, but only to the same extent as possessed or enjoyed by, and to be possessed and enjoyed only in the same territory as in the case of, each such merging corporation;

“(c) All property, real and personal, and all debts due on whatever account, including stock subscriptions and other things in action, belonging to any of the merging corporations shall be held to be transferred to and vested in the continuing corporation without further act or deed, as effectually as they were vested in the merging corporation;

“(d) All debts, liabilities, and duties of each of the merging corporations shall thenceforth attach to the continuing corporation, and become and be its debts, liabilities, and duties and be enforceable against it to the same extent as if such debts, liabilities, and duties had been incurred or contracted by or imposed upon it.

“[(2)] (*3*) In the case of any such *corporate* consolidation or merger [effected under the authority of this title], the rights of creditors and all liens upon the property of any of the constituent *or merging* corporations shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence so far as may be necessary to preserve the same.

“[(3)] (*4*) Any action or proceeding pending, *upon the effective date of the order of the commission*, by or against any such constituent *or merging* corporation may be prosecuted to judgment as if such consolidation *or merger* had not been effected, but the resulting corporation *or the continuing corporation, as the case may be*, may [, upon its motion,] *upon motion become or* be made a party thereto.

[“DISSENTING SECURITY HOLDERS

“SEC. 212. (1) In the case of any plan proposed by two or more carriers under section 203, any holder of a voting security issued by any carrier a party to the plan, who did not vote for the adoption of the plan, may, within ninety days after the annual or special meeting at which the holders of the voting securities of such carrier consented thereto, give notice in writing to such carrier that he does not assent, except that if any holder of any such voting security, at the time such vote is taken, is under a legal disability, and if at such time there is no legal representative duly authorized to vote in respect of such security, then such notice may be given at any time prior to the expiration of ninety days from the date on which such disability is removed or the date on which a legal representative is duly authorized to act for such holder, whichever date is the earlier. If such notice in respect of any such voting security is not received by such carrier within such time, the holder of such security shall be held to have consented to such order.

“(2) Any voting security issued by any carrier, a party to a plan under section 203, and held by any such nonassenting holder who, under the terms under which such security was issued, the charter or articles of incorporation of such carrier, or the provisions of law applicable thereto, is not bound by the vote by which the plan was adopted, shall, if the plan involves the retirement of his security or the surrender of his security in exchange for any other security, be purchased by the corporation which is to manage and operate and own or control the properties, or, if for any reason not so purcahsed, shall be acquired by condemnation by such corporation, in accordance with the provisions of section 213.]

“DISSENTING STOCKHOLDERS

“SEC. 212. (1) Any stockholder of a carrier owning or possessing railroad or terminal property all or the greater part of which would be acquired by another carrier, or of a carrier which would be merged into or consolidated with another carrier, in pursuance of a plan providing for a method of unification under subdivision (a), (b) or (c) of paragraph (2) of Section 203, who was registered as such prior to the filing of the petition proposing the plan and continued to be so registered until the closing of the books for the purpose of the meeting of the stockholders at which the

consent to the adoption of the plan as approved by the commission was voted, and who either at such meeting voted against the adoption of the plan or prior thereto gave to the carrier of which he is a stockholder a written protest against the adoption of such plan, may within thirty days after such meeting give written notice to such carrier that he does not consent to the adoption of such plan (except that if at the time of such meeting any such registered stockholder is deceased or under a legal disability and there is no legal representative duly authorized to act for him, or if any such registered stockholder dies or becomes under a legal disability within such thirty days, then such notice may be given at any time prior to the expiration of ninety days from the date on which such disability is removed or the date on which a legal representative is duly authorized to act for such stockholder, whichever date is the earlier). Every such stockholder, and no others, by or for whom such notice is given, shall be deemed to be a 'dissenting stockholder' as that term is used in this title.

"(2) The petitioning carriers, at any time before the effective date of the order of the commission approving the plan, may withdraw and abandon their petition proposing a plan as to which there is a dissenting stockholder; but otherwise, then on and after such effective date, every dissenting stockholder shall be entitled to have all shares of stock registered in his name as aforesaid prior to the filing of the petition and still continuing so registered, purchased by the acquiring, continuing, or resulting corporation under the plan, or, if not so purchased, taken by condemnation in accordance with the provisions of section 213.

"(3) The opportunity to be heard by the commission and the right to secure just compensation for their stock, as afforded by this title, shall constitute the sole and exclusive remedies, in opposition to the plan, of stockholders of a carrier owning or possessing railroad or terminal property all or the greater part of which would be acquired by another carrier or of a carrier which would be merged into or consolidated with another carrier pursuant to a plan providing for a method of unification under subdivision (a), (b), or (c) of paragraph (2) of section 203.

"RIGHT OF EMINENT DOMAIN

"SEC. 213. (1) The corporation [authorized] *which, under the provisions of section 212, may be required to purchase or* to acquire by condemnation the [securities] *stock* of any [nonassenting holder] *dissenting stockholder*, [under the provisions of section 212,] shall, unless the [securities are] *stock is* purchased pursuant to section 212, institute proceedings in the United States district court for a judicial district within a State in which the carrier which issued the [securities] *stock* is chartered, for the condemnation of such [securities] *stock*. [Thereupon the court shall transmit, under its seal, the petition, or a copy thereof, to the Interstate Commerce Commission, for an inquiry and report to the court of the just compensation to be paid therefor.] *In the case of a carrier chartered under an act of Congress, then such proceedings shall be instituted in the Supreme Court of the District of Columbia.*

"(2) If such corporation fails to purchase or to institute and maintain condemnation proceedings, any such [nonassenting holder] *dissenting stockholder* or, if *deceased or* under a legal disability, his legal representative may, after the expiration of [six months from the date on which notice to the carrier was given, in accordance with paragraph (1) of section 212,] *ninety days from the effective date of the order of the commission approving the plan*, institute in his behalf proceedings for the condemnation by the corporation of the [voting securities held by him] *shares of the capital stock then held by him which were registered in his name prior to the filing of the petition proposing such plan and continuing to be so registered.* Such proceedings shall be had in the court which would have had jusisdiction of such proceedings if instituted by the corporation. [All costs attaching to such proceedings shall be assessed against the corporation.]

"(3) Any corporation authorized by an order of the commission entered under this title to acquire any property (other than [securities] *stock*), or any right or interest in any such property, held or enjoyed without power of assignment or transfer, may, *with the consent of the owner or holder thereof*, institute proceedings in the United States District Court for the judicial district in which such property is located, or of which the owner of such property, right, or interest is an inhabitant, for the condemnation of such property, right, or interest. [Thereupon the court shall transmit, under its seal, the petition, or a copy thereof, to the Interstate Commerce Commission, for an inquiry and report to the court of the just compensation to be paid therefor.] If such property is located in the District of Columbia, application may be made to the Supreme Court of the District of Columbia.

"(4) Upon the institution of any proceedings under paragraphs (1), (2), or (3) of this section, the court shall transmit, under its seal, the petition, or a copy thereof, to the Interstate Commerce Commission, for an inquiry and report to the court of the just compensation to be paid for the stock or other property, or right or interest in property, to be condemned in said proceedings. The costs of any proceedings under paragraphs (1), (2), or (3) of this section shall be taxed against the carrier.

"[(4)] (5) The United States district courts and the Supreme Court of the District of Columbia are hereby given jurisdiction to hear and determine proceedings for condemnation instituted under this section, and to enter appropriate orders of condemnation therein, and it shall be the duty of the commission, upon receipt of any such petition, or a copy thereof, from any such court, to ascertain the just compensation to be paid for any such [securities] *stock*, or any such property, right, or interest, and to report thereon to the court.

"[(5)] *(6)* The practice, pleadings, forms, and modes of procedure for proceedings for condemnation under this section *(except proceedings by the commission)* shall conform as nearly as may be to the practice, pleadings, forms, and modes of proceedings in suits in equity, and the powers of the courts of the United States to prescribe rules for proceedings shall apply to proceedings for condemnation under this section to the same extent as they apply to suits in equity; except that—

"(a) All, or any number of, the [nonassenting holders] *dissenting stockholders* of [voting securities issued by] anyone carrier, or their legal representatives, may be joined in one proceeding;

"(b) Notice of any such petition shall be given the [holders of the securities] *stockholders*, or their legal representatives, or the owners of the property or the right and interest therein to be condemned either by personal service, or, if for good cause shown permitted by the court, by publication at least once a week for four successive weeks in a newspaper published in the judicial district or in the District of Columbia (as the case may be);

"(c) Reasonable notice and opportunity to be heard shall be afforded each such [holder] *stockholder*, legal representative, or owner, by the commission, in such manner as the commission or the court may prescribe; and

"(d) The report of the commission shall be treated by the court and proceeded on in the same manner as the report of a master in chancery in a suit in equity *and the court may, for good cause shown, hear and consider additional evidence or remand the proceeding to the commission for the taking of additional evidence and further consideration and report.*

"[(6)](7) Upon the payment of the amount of the award, or in the case of refusal to receive the amount, then upon the deposit thereof with the clerk of the court, the [security] *stock* or property or the right or interest therein shall be held to be transferred to the petitioning carrier or corporation and to have become its [security] *stock*, property, right, or interest. In case of failure to pay the amount awarded within [six months] *thirty days* after the judgment or decree making the award has become final and upon the deposit with the clerk of the court of [such security] *the certificate of such stock* properly assigned or the documents properly transferring such property, right, or interest, final process to execute the award may be had by writ of execution in the form used by the court in suits [of] *at* common law in actions of assumpsit.

"TAXATION

"SEC. 214. No tax shall be levied or collected under any revenue law of the United States, or by or under the authority of any State or any political subdivision thereof, in respect of any [issuance] *issue*, sale, delivery, or transfer of any security or any agreement to sell, or memorandum of sale of, any security, or any grant, assignment, transfer, or other conveyance of any interest in real or personal property, in respect of the incorporation or reincorporation of any carrier, or in respect of any other means or proceeding necessary or appropriate to carry a unification into effect, if in pursuance of a unification approved by the commission under this title. Gain from the sale or other disposition of property, or income from any distribution, in connection with any such unification, shall not be subject to tax by or under the authority of any State or any political subdivision thereof. Any such unification shall be held to be a reorganization within the meaning of that term as used in Part I of Title II of the revenue act of 1926.

"APPLICATION OF EXISTING LAWS

"SEC. 215. (1) The provisions of section 20a, other than those of paragraph (10), shall not apply to [any issuance] *the issue* of securities, or the assumption of any obligation or liability in respect of any securities, if authorized by, and in accordance with the terms and conditions of, an order of the commission issued under this title, approving a plan.

"(2) The provisions of paragraphs (18), (19), and (20) of section 1 shall not apply to any extension, enlargement, or abandonment of properties, if authorized by, and in accordance with the terms and conditions of, and order issued by the commission under this title, approving a plan, nor shall such paragraphs apply to any construction, acquisition, or operation of lines or transportation over such lines, in pursuance of the extension, enlargement, or abandonment.

"(3) Any of the evidence included in the record of the commission in its proceedings under paragraph (2), (4), or (5) of section 5 and any abstract or written materials made by the commission and based upon such evidence, shall be preserved and shall be available to and may be used by the commission in its proceedings upon a petition filed under this title; but any such evidence, abstract, or materials so used shall, by reference or otherwise, be made a part of its record in such proceedings.

["SEC. 216. Paragraph (2) of section 5 of the interstate commerce act is amended by adding at the end thereof the following new sentence: 'If an application under this paragraph proposes an acquisition authorized under the provisions of Title II of this act, the commission may, if it is of opinion that the public interest so requires, make it a condition of its further consideration of the application that the applicant conform to and proceed under the provisions of such title.']

"Sec. 216. (1) Whenever the commission is of opinion, after hearing, upon the application of one or more carriers, that the acquisition, to the extent indicated by the commission, by one of such carriers of control, under a lease or by the purchase of stock or in any other manner, of a carrier whose main track does not exceed one hundred miles in length, is in the public interest, the commission shall have authority by order to approve and authorize such acquisition, upon such terms, conditions and methods as the commission finds to be just and reasonable.

"(2) If an application under this section or under paragraph (2) of section 5 proposes an acquisition authorized under the provisions of section 202, the commission may, if it is of the opinion that it is necessary or desirable in the public interest, make it a condition of its further consideration of the application that the applicant conform to, and proceed under, the provisions of this title (other than the provisions of paragraph (1) of this section).

"SEC. 217. Upon the expiration of seven years from the passage of the railway consolidation act of [1926] *1928* it shall be the duty of the commission to report to Congress the extent to which unifications have taken place in accordance with such act, and, in the light of conditions then existing, its recommendations as to further proceedings.

["SEC. 218. Paragraphs (4), (5), and (6) of section 5 are hereby repealed.]

"SEPARABILITY OF PROVISIONS

"SEC. [219] *218*. If any provision of this title is declared unconstitutional, or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the title and of the application of such provision to other persons and circumstances shall not be affected thereby."

REPEALS

Sec. 3. (1) Paragraphs (4), (5), and (6) of section 5 of the interstate commerce act are hereby repealed.

(2) Paragraph (2) of section 5 of the interstate commerce act is hereby amended by adding at the end thereof a new sentence to read as follows: "No application shall be made under this paragraph after the enactment of the railway consolidation act of 1928."

SHORT TITLE

SEC. [2] *4*. This act may be cited as the "Railway consolidation act of [1927] *1928*."

If the amendments proposed by the law committee are adopted, the bill will read as follows:

A BILL To promote the unification of carriers engaged in interstate commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interstate commerce act, as amended, is amended by inserting after the enacting clause thereof the following heading:

"TITLE I.—REGULATORY PROVISIONS—GENERAL"

SEC. 2. The interstate commerce act, as amended, is amended by adding at the end thereof a new title to read as follows:

"TITLE II.—REGULATORY PROVISIONS—UNIFICATION OF CARRIERS

"DEFINITIONS

"SEC. 201. As used in this title—

"(1) The term 'interstate or foreign commerce' means commerce between any place in a State, Territory, or possession of the United States, or the District of Columbia, and any place outside thereof; or between points within the same State or within the District of Columbia, but through any place outside thereof; or within the District of Columbia.

"(2) The term 'carrier' means (a) a common carrier engaged in the transportation in interstate or foreign commerce of passengers or property wholly by railroad or partly by railroad and partly by water, within the continental United States, subject to Title I of this act; (b) a railroad or terminal corporation, even though not engaged in such transportation, which owns property used or held for use in such transportation; and (c) a corporation organized to effect a unification under this title and for the purpose of engaging in transportation by railroad subject to this act; but does not include sleeping-car companies or express companies.

"(3) The term 'securities' includes shares of capital stock, bonds, or other evidneces of interest or indebtedness issued by a carrier.

"(4) The term 'stock' means all outstanding shares of capital stock, whether or not such shares havie voting privileges.

"AUTHORITY FOR UNIFICATIONS

"SEC. 202. (1) The unification through any method or procedure provided for in this title, of carriers or property of carriers, is hereby authorized, and the commission shall carry out the provisions of this title in such manner as in its opinion will protect the public interest, preserve necessary weak or short lines, prevent any undue lessening of existing carrier competition in service in cases where such competition is deemed by it essential to the public interest, and bring about ultimately the establishment of a number of strong, efficient, and well-balanced systems, calculated to facilitate simplified and more effective regulation, to promote economy, to afford better service, to maintain as far as practicable the existing routes and channels of trade and commerce, to eliminate unnecessary duplications and wasteful competition and to provide the advantages of competition between the systems so established.

"(2) The unification of carriers or any of the railway properties of carriers, directly or indirectly, after the enactment of the railway consolidation act of 1928, shall be unlawful, unless such unification is in accordance with the provisions of this title or with an order of the commission under paragraph (2) of section 5; but the provisions of this title shall not be held to prohibit, in the exercise of any power conferred by State authority and in accordance with State law, (a) the acquisition by any carrier of securities issued by another carrier in an amount not sufficient to constitute control of such other carrier, or (b) the acquisition by a carrier of additional securities issued by another carrier of which control has been previously lawfully acquired, or (c) the formation of a subsidiary corporation, and the acquisition of all or any part of the securities thereof, for the construction, use, ownership, or control of branches, terminals, or other property.

"UNIFICATION UNDER AUTHORITY OF THIS TITLE

"SEC. 203. (1) In order to bring about such unification, two or more carriers shall have power to agree on a plan therefor to be carried out under the authority of this title.

"(2) The plan may provide for one or more of the following:

"(a) An acquisition by or transfer to one of the petitioning carriers or to any other carrier, by purchase, sale, exchange, lease, or otherwise, of all or a part, or the right to operate all or a part, of the properties and franchises of one or more

carriers, and, if so desired, the disposition of all or a part of the remaining assets of any such carriers.

"(b) A corporate merger of the properties, rights, and franchises, of one or more carriers into one of the petitioning carriers or any other carrier corporation.

"(c) A corporate consolidation of the properties, rights, and franchises of two or more carriers into a single corporation.

"(d) An acquisition of securities by purchase, exchange, lease, or otherwise, issued by a carrier, if such acquisition is proposed to be made as part of a plan to effect a unification.

"(3) Nothing in this title shall be construed to authorize or provide for the creation, directly or indirectly, of any Federal or National corporation; and all the powers, rights, privileges, and franchises granted by this act to any corporation now existing or hereafter created are, and shall be deemed to be, supplementary and in addition to, or in modification of, the powers, rights, privileges, and franchises of such corporation granted by its charter, or existing under the laws by virtue of which it was or may be created.

"JOINT AGREEMENT AND PETITION

"SEC. 204. (1) Two or more carriers may petition the commission for the approval of a plan to be carried out under the authority of this title if the boards of directors of such carriers have authorized a joint agreement, under their respective corporate seals, proposing such plan. The petition shall set out the plan in such detail as the commission may require. Any such petition or plan may be amended at any time by leave of the commission.

"(2) Such joint agreement shall set out—

"(a) The terms and conditions of the plan and the methods by which it is to be effected.

"(b) A statement of the financial plan and of the securities, if any, to be authorized and to be issued in carrying out such plan, the substantial rights, privileges, powers, and immunities granted or denied the holders of one class of shares that are not equally granted or denied the holders of any other class of shares, and the terms on which such securities are to be issued.

"(c) Such other provisions and details not inconsistent with this title as the boards of directors may deem necessary or appropriate, or as the commission may require.

"(3) Any such joint agreement shall be held to be authorized by the board of directors of any such carrier if a majority of the number of such directors in office vote therefor.

"(4) A copy of the joint agreement, entered into in accordance with the provisions of this section, shall be filed as a part of the petition.

"ACQUISITION OF SECURITIES BY A CARRIER

"SEC. 205. (1) Any carrier, in order to bring about a unification through the acquisition of securities, may petition the commission for the approval of a plan to be effected by the acquisition by such carrier of securities issued by any other carrier or carriers, if such plan has been adopted by the board of directors of the petitioning carrier. Such petition shall set out the plan, including the terms, methods, and purpose of the proposed acquisition and the issue of any new securities that may be involved therein, in such detail as the commission may require. Such plan shall be held to be adopted by the board of directors of the petitioning carrier if a majority of the number of such directors in office vote therefor.

"(2) The commission may, upon the application of any carrier which is the owner of any of the securities issued by another carrier, and after hearing, by order approve and authorize the acquisition of additional securities issued or to be issued by such other carrier, under such rules and regulations and for such consideration and on such terms and conditions as it may prescribe.

"NOTICE AND HEARING

"SEC. 206. (1) The commission shall give reasonable notice of the time and place for a public hearing to each of the carriers filing, or joining in the filing of, a petition under this title, and to the governor of each State in which is located any part of the lines of any of such carriers. Such carriers, any any governor so notified, or any representative of the State designated by him, and, subject to such rules as the commission may prescribe, any other person having an interest shall be afforded a reasonable opportunity to be heard.

"(2) In any proceeding upon a petition filed under this title the commission may, in its discretion, without separate hearing, take any action is it authorized to take under the provisions of section 20a of this act; and in any proceeding upon a petition filed under section 204 the commission may, in its discretion, without separate hearing, take any action which it is authorized to take under the provisions of paragraphs (18), (19), or (20) of section 1 of this act.

"(3) Prior to or at the time a petition is called for hearing, but not thereafter except for good cause shown, any carrier may file with the commission an intervenor's petition praying that it be made a party to the proposed unification.

"ORDER OF THE COMMISSION

"SEC. 207. (1) If, after such hearing, the commission is of the opinion that the proposed unification will be in accordance with the provisions of section 202, and finds that such provisions of this title as are conditions precedent to the entry of the order have been complied with, the commission shall enter in order approving the plan, on the terms and conditions and by the methods set forth in the petition, or with such modifications thereof, or upon such terms, conditions, and methods, as it may prescribe as necessary in the public interest, and also, if the commission shall find upon objection of a stockholder of a carrier, a party to the proposed plan of unification, that certain terms and conditions of said plan subject such stockholder to undue or unreasonable prejudice, then with such modifications of the plan, or upon such terms, conditions and methods, as it may prescribe as necessary to remove or correct such prejudice. If the order of the commission (whether of not any intervenor's petition has been filed) imposes as a condition to the approval of the proposed unification that a carrier not joining in filing the petition be made a party to the unification, the carriers filing the petition may report to the commission the efforts made by them to comply with the condition; and if, after hearing, the commission is of opinion that the carrier that is to be made a party is insisting on unreasonable terms, the commission may revoke or modify the condition or, if requested to do so by such carrier, may prescribe the terms on which the carrier may be made a party to the proposed unification.

"(2) The carriers and the commission shall give due consideration to the inclusion in the plan of short and of weak carriers in the territory involved; and in order that the provisions of section 202 may be carried out, the commission is directed to make and have available for its use, a study of the short and weak carriers, but without postponing for the purpose of any general study the consideration of and action upon any plan proposed under this title.

"(3) The issue of securities under or in connection with any plan of corporate consolidation or merger shall be subject to the provisions of section 20a of this act, but such provisions may be administered as provided in paragraph (2) of section 206.

"(4) The commission may, from time to time, for good cause shown, upon the petition of a carrier (or of its successor in interest) which, under the plan, acquires the property of another carrier, make such orders, supplemental to any order issued under this title, as it may deem necessary or appropriate.

"CONSENT OF CARRIERS

"SEC. 208. (1) The order of the commission under section 207 shall not become effective unless the board of directors and the holders of the stock of each of the carriers designated therein, or, in the case of an acquisition of securities under section 205 or under subdivision (d) of paragraph (2) of section 203, the board of directors of the acquiring carrier, consent thereto.

"(2) The board of directors of a carrier shall be held to have consented thereto if a majority of the number of such directors in office vote for the adoption of the plan, as approved.

"(3) The holders of the stock of any such carrier shall be held to have consented thereto if at least a majority of the votes to which the holders of all outstanding shares of capital stock are entitled are cast in favor of the adoption of the plan as approved. Such votes may be cast, in person or by proxy, at an annual or special meeting held and conducted, and notice of which has been given, in any manner lawful for an annual or special meeting (as the case may be) of the stockholders of such carrier. The number of votes which any such stockholder is entitled to cast at any such meeting shall be determined as follows:

"(a) The holder of any such stock entitled to vote in respect thereof in the election of directors of the carrier, shall have the right to cast the same number of votes in respect thereof as he would be entitled to cast in such election, except that there shall be no right of cumulative voting.

"(b) The holder of any share of outstanding capital stock not entitled to vote in respect thereof under subdivision (a) of this paragraph shall have the right to cast, upon the question of the adoption of the plan as approved, one vote in respect of each such share.

"(4) A certificate for each carrier, under its corporate seal, signed by its president or one of its vice presidents, and attested by its secretary or an assistant secretary, and duly acknowledged before a notary public by such president or vice president and secretary or assistant secretary, that its board of directors and, when required, the holders of its stock have consented thereto, shall be filed with the commission and shall be prima facie evidence of the facts so certified.

"(5) Notwithstanding any covenant or provision in any mortgage, deed of trust or other contract heretofore or hereafter made by a carrier, a party to a plan of unification under this title, prohibiting a merger or consolidation of such carrier or a sale or lease of its properties, or requiring the consent thereto of holders of bonds, debentures or other evidences of indebtedness issued under such mortgage, deed of trust or other contract, or of the trustee therein named, such prohibition shall not prevent, nor shall such consent be necessary to, the approval by the commission or the carrying into effect of such plan of unification as approved, and no default shall result, whereby there shall arise or be enforced a right to declare such bonds, debentures or other evidences of indebtedness immediately due and payable or to enter upon the mortgaged property or to sell or foreclose any security or to take any other action provided by such mortgage, deed of trust or other contract, by reason of the carrying into effect of such plan of unification despite such prohibition or without such consent; it being hereby declared that all such covenants and provisions to the extent that they tend to hinder or prevent any unification of carriers under the authority of this title are contrary to the public interest.

"EFFECTIVE DATE OF ORDER OF THE COMMISSION

"SEC. 209. The order of the commission approving such plan shall become effective upon the certification by the commission that the board of directors and, when required, the holders of the stock of each of the carriers designated therein have consented thereto in the manner provided in section 208.

"EFFECT OF ORDER OF THE COMMISSION

"SEC. 210. (1) On and after the effective date of the order of the commission approving such plan, or an order of the commission (whether entered before or after the passage of the railway consolidation act of 1928) approving an acquisition of control, each carrier designated in any such order, in accordance with such order, shall have authority and power necessary or appropriate to carry into effect, and to do any and all acts necessary or appropriate in order to carry into effect, such plan or acquisition; to issue, sell, or exchange securities, in accordance with the terms and conditions and by the methods, if any, set forth in such order; to hold, maintain and operate any properties acquired by it pursuant to such plan; and to exercise its franchises, and to carry on and to do any business authorized by its franchises, whether theretofore its own or acquired by it pursuant to such plan.

"(2) Any such carrier and its officers, directors, agents, and employees shall be relieved from the operation of the 'antitrust laws' as designated in section 1 of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and the operation of the first sentence of paragraph (12) of section 20a of this act; from all other restraints and prohibitions of any other law of the United States; and from all restraints or prohibitions of the laws or constitution of any State or any decision or order of any State authority—in so far as may be necessary or appropriate to enable such carrier and its officers, directors, and agents to enter into and carry into effect such plan, and to make such acquisition, or in accordance with such plan to hold, maintain, and operate any properties and exercise any franchises, whether theretofore its own or acquired by it pursuant to such plan.

"(3) The entry of any order by the commission under this title and the certification by the commission under section 209 shall be conclusive evidence that the carriers designated in such order, and their boards of directors and stockholders, have complied with the provisions of this title which are applicable to such carriers, boards of directors, and stockholders and which are conditions precedent to the entry of such order and such certification.

"(4) The title to, or right or interest in, real estate, vested by deed or otherwise in any carrier designated in the order of the commission, shall not be held to revert or to be in any way impaired by reason of this title of this act or of anything done under the provisions of this title of this act or an order of the commission entered thereunder.

"EFFECT OF CORPORATE CONSOLIDATION AND MERGER

"SEC. 211. (1) Upon the effective date of the order of the commission in the case of a plan presented for a corporate consolidation of two or more carrier corporations (referred to in this title as the 'constituent corporation') into a single corporation (referred to in this title as the 'resulting corporation'), except as restricted or limited in the joint agreement, or in the petition, as approved or granted by, or in the order of, the commission—

"(a) The corporations shall be held to be consolidated;

"(b) The resulting corporation shall have all and singular the rights, privileges, powers, immunities, exemptions, and franchises of each of the constituent corporations, respectively, but only to the same extent as possessed or enjoyed by, and to be possessed and enjoyed only within the same territory as in the case of, each such constituent corporation;

"(c) All property, real and personal, and all debts due on whatever account, including stock subscriptions and other things in action, belonging to any of the constituent corporations shall be held to be transferred to and vested in the resulting corporation without further act or deed, as effectually as they were vested in the constituent corporation;

"(d) All debts, liabilities, and duties of each of the constituent corporations shall thenceforth attach to the resulting corporation, and become and be its debts, liabilities, and duties, and be enforceable against it to the same extent as if such debts, liabilities, and duties had been incurred or contracted by or imposed upon it.

"(2) Upon the effective date of the order of the commission in the case of a plan presented for a corporate merger of one or more carriers (referred to in this title as the 'merging corporations') into one of the petitioning carriers or any other carrier corporation (referred to in this title as the 'continuing corporation'), except as restricted or limited in the joint agreement, or in the petition, as approved or granted by, or in the order of, the commission—

"(a) The corporations shall be held to be merged into the continuing corporation;

"(b) The continuing corporation shall have all and singular the rights, privileges, powers, immunities, exemptions, and franchises of each of the merging corporations, respectively, but only to the same extent as possessed or enjoyed by, and to be possessed and enjoyed only in the same territory as in the case of, each such merging corporation;

"(c) All property, real and personal, and all debts due on whatever account, including stock subscriptions and other things in action, belonging to any of the merging corporations shall be held to be transferred to and vested in the continuing corporation without further act or deed, as effectually as they were vested in the merging corporation;

"(d) All debts, liabilities, and duties of each of the merging corporations shall thenceforth attach to the continuing corporation, and become and be its debts, liabilities, and duties and be enforceable against it to the same extent as if such debts, liabilities, and duties had been incurred or contracted by or imposed upon it.

"(3) In the case of any such corporate consolidation or merger, the rights of creditors and all liens upon the property of any of the constituent or merging corporations shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence so far as may be necessary to preserve the same.

"(4) Any action or proceeding pending, upon the effective date of the order of the commission, by or against any such constituent or merging corporation may be prosecuted to judgment as if such consolidation or merger had not been effected, but the resulting corporation or the continuing corporation, as the case may be, may upon motion become or be made a party thereto.

"DISSENTING STOCKHOLDERS

"SEC. 212. (1) Any stockholder of a carrier owning or possessing railroad or terminal property all or the greater part of which would be acquired by another carrier, or of a carrier which would be merged into or consolidated with another carrier, in pursuance of a plan providing for a method of unification under subdivision (a), (b), or (c) of paragraph (2) of section 203, who was registered as such prior to the filing of the petition proposing the plan and continued to be so registered until the closing of the books for the purpose of the meeting of the stockholders at which the consent to the adoption of the plan as approved by the commission was voted, and who either at such meeting voted against the adoption of the plan or prior thereto gave to the carrier of which he is a stockholder a written protest against the adoption of such plan, may within thirty days after such meeting give written notice to such carrier that he does not consent to the adoption of such plan (except that if at the time of such meeting any such registered stockholder is deceased or under a legal disability and there is no legal representative duly authorized to act for him, or if any such registered stockholder dies or becomes under a legal disability within such thirty days, then such notice may be given at any time prior to the expiration of ninety days from the date on which such disability is removed or the date on which a legal representative is duly authorized to act for such stockholder, whichever date is the earlier). Every such stockholder, and no others, by or for whom such notice is given, shall be deemed to be a 'dissenting stockholder' as that term is used in this title.

"(2) The petitioning carriers, at any time before the effective date of the order of the Commission approving the plan, may withdraw and abandon their petition proposing a plan as to which there is a dissenting stockholder; but otherwise, then on and after such effective date, every dissenting stockholder shall be entitled to have all shares of stock, registered in his name as aforesaid prior to the filing of the petition and still continuing so registered, purchased by the acquiring, continuing or resulting corporation under the plan, or, if not so purchased, taken by condemnation in accordance with the provisions of section 213.

"(3) The opportunity to be heard by the commission and the right to secure just compensation for their stock, as afforded by this title, shall constitute the sole and exclusive remedies, in opposition to the plan, of stockholders of a carrier owning or possessing railroad or terminal property all or the greater part of which would be acquired by another carrier or of a carrier which would be merged into or consolidated with another carrier pursuant to a plan providing for a method of unification under subdivision (a), (b), or (c) of paragraph (2) of section 203.

"RIGHT OF EMINENT DOMAIN

"SEC. 213. (1) The corporation which, under the provisions of section 212, may be required to purchase or to acquire by condemnation the stock of any dissenting stockholder, shall, unless the stock is purchased pursuant to section 212, institute proceedings, in the United States district court for a judicial district within a State in which the carrier which issued the stock is chartered, for the condemnation of such stock. In the case of a carrier chartered under an act of Congress, then such proceedings shall be instituted in the Supreme Court of the District of Columbia.

"(2) If such corporation fails to purchase or to institute and maintain condemnation proceedings, any such dissenting stockholder, or if deceased or under a legal disability, his legal representative, may, after the expiration of ninety days from the effective date of the order of the commission approving the plan, institute in his behalf proceedings for the condemnation by the corporation of the shares of the capital stock then held by him which were registered in his name prior to the filing of the petition proposing such plan and continuing to be so registered. Such proceedings shall be had in the court which would have had jurisdiction of such proceedings if instituted by the corporation.

"(3) Any corporation authorized by an order of the commission entered under this title to acquire any property (other than stock), or any right or interest in any such property, held or enjoyed without power of assignment or transfer, may, with the consent of the owner or holder thereof, institute proceedings in the United States district court for the judicial district in which such property is located, or of which the owner of such property, right, or interest is an inhabitant, for the condemnation of such property, right, or interest. If such property is located in the District of Columbia, application may be made to the Supreme Court of the District of Columbia.

"(4) Upon the institution of any proceedings under paragraph (1), (2), or (3) of this section, the court shall transmit, under its seal, the petition, or a copy thereof, to the Interstate Commerce Commission, for an inquiry and report to the court of the just compensation to be paid for the stock or other property, or right of interest in property, to be condemned in said proceedings. The costs of any proceedings under paragraphs (1), (2) or (3) of this section shall be taxed against the carrier.

"(5) The United States district courts and the Supreme Court of the District of Columbia are hereby given jurisdiction to hear and determine proceedings for condemnation instituted under this section, and to enter appropriate orders of condemnation therein, and it shall be the duty of the commission, upon receipt of any such petition, or a copy thereof, from any such court, to ascertain the just compensation to be paid for any such stock, or any such property, right, or interest, and to report thereon to the court.

"(6) The practice, pleadings, forms, and modes of procedure for preceedings for condemnation under this section (except proceedings by the commission) shall conform as nearly as may be to the practice, pleadings, forms, and modes of proceedings in suits in equity, and the powers of the courts of the United States to prescribe rules for proceedings shall apply to proceedings for condemnation under this section to the same extent as they apply to suits in equity; except that—

"(a) All, or any number of, the dissenting stockholders of any one carrier, or their legal representatives, may be joined in one proceeding;

"(b) Notice of any such petition shall be given the stockholders, or their legal representatives, or the owners of the property or the right and interest therein to be condemned either by personal service, or, if for good cause shown permitted by the court, by publication at least once a week for four successive weeks in a newspaper published in the judicial district or in the District of Columbia (as the case may be);

"(c) Reasonable notice and opportunity to be heard shall be afforded each such stockholder, legal representative, or owner, by the commission, in such manner as the commission or the court may prescribe; and

"(d) The report of the commission shall be treated by the court and proceeded on in the same manner as the report of a master in chancery in a suit in equity and the court may, for good cause shown, hear and consider additional evidence or remand the proceeding to the commission for the taking of additional evidence and further consideration and report.

"(7) Upon the payment of the amount of the award, or in the case of refusal to receive the amount, then upon the deposit thereof with the clerk of the court, the stock or property or the right or interest therein shall be held to be transferred to the petitioning carrier or corporation and to have become its stock, property, right, or interest. In case of failure to pay the amount awarded within thirty days after the judgment or decree making the award has become final and upon the deposit with the clerk of the court of the certificate of such stock properly assigned or the documents properly transferring such property, right, or interest, final process to execute the award may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit.

"TAXATION

"SEC. 214. No tax shall be levied or collected under any revenue law of the United States, or by or under the authority of any State or any political subdivision thereof, in respect of any issue, sale, delivery, or transfer of any security or any agreement to sell, or memorandum of sale of, any security, or any grant, assignment, transfer, or other conveyance of any interest in real or personal property, in respect of the incorporation or reincorporation of any carrier, or in respect of any other means or proceeding necessary or appropriate to carry a unification into effect, if in pursuance of a unification approved by the commission under this title. Gain from the sale or other disposition of property, or income from any distribution, in connection with any such unification, shall not be subject to tax by or under the authority of any State or any political subdivision thereof. Any such unification shall be held to be a reorganization within the meaning of that term as used in Part I of Title II of the revenue act of 1926.

"APPLICATION OF EXISTING LAWS

"SEC. 215. (1) The provisions of section 20a, other than those of paragraph (10), shall not apply to the issue of securities, or the assumption of any obligation or liability in respect of any securities, if authorized by, and in accordance with the terms and conditions of, an order of the commission issued under this title, approving a plan.

"(2) The provisions of paragraphs (18), (19), and (20) of section 1 shall not apply to any extension, enlargement, or abandonment of properties, if authorized by, and in accordance with the terms and conditions of, an order issued by the commission under this title, approving a plan, nor shall such paragraphs apply to any construction, acquisition, or operation of lines or transportation over such lines, in pursuance of the extension, enlargement, or abandonment.

"(3) Any of the evidence included in the record of the commission in its proceedings under paragraph (2), (4), or (5) of section 5 and any abstract or written materials made by the commission and based upon such evidence, shall be preserved and shall be available to and may be used by the commission in its proceedings upon a petition filed under this title; but any such evidence, abstract or materials so used shall, by reference or otherwise, be made a part of its record in such proceedings.

"SEC. 216. (1) Whenever the commission is of opinion, after hearing, upon the application of one or more carriers, that the acquisition, to the extent indicated by the commission, by one of such carriers of control, under a lease or by the purchase of stock, or in any other manner, of a carrier whose main track does not exceed one hundred miles in length, is in the public interest, the commission shall have authority by order to approve and authorize such acquisition, upon such terms, conditions, and methods as the commission finds to be just and reasonable.

"(2) If an application under this section or under paragraph (2) of section 5 proposes an acquisition authorized under the provisions of section 202, the commission may, if it is of the opinion that it is necessary or desirable in the public interest, make it a condition of its further consideration of the application that the applicant conform to, and proceed under, the provisions of this title (other than the provisions of paragraph (1) of this section).

"SEC. 217. Upon the expiration of seven years from the passage of the railway consolidation act of 1928 it shall be the duty of the commission to report to Congress the extent to which unifications have taken place in accordance with such act, and, in the light of conditions then existing, its recommendations as to further proceedings.

"SEPARABILITY OF PROVISIONS

"SEC. 218. If any provision of this title is declared unconstitutional, or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the title and of the application of such provisions to other persons and circumstances shall not be affected thereby."

REPEALS

SEC. 3. (1) Paragraphs (4), (5), and (6) of section 5 of the interstate commerce act are hereby repealed.

(2) Paragraph (2) of section 5 of the interstate commerce act is hereby amended by adding at the end thereof a new sentence to read as follows: "No application shall be made under this paragraph after the enactment of the railway consolidation act of 1928."

SHORT TITLE

SEC. 4. This act may be cited as the "railway consolidation act of 1928."

STATEMENT OF HON. HENRY C. HALL, INTERSTATE COMMERCE COMMISSIONER, WASHINGTON, D. C.

The CHAIRMAN. Will you state your name and your position?

Commissioner HALL. My name is Henry C. Hall. I am and have been for nearly 14 years a member of the Interstate Commerce Commission.

The CHAIRMAN. You may proceed, Mr. Commissioner, with any statement that you care to make, either on the general subject of consolidation or with special reference to the Fess bill which is under consideration by this committee.

Commissioner HALL. Mr. Chairman, I have appeared before this committee and the House committee repeatedly in connection with the proposed amendments and modifications of the existing consolidation statute, and the views of the commission and my own views have been so fully made known that perhaps it is hardly necessary for me to repeat them.

The CHAIRMAN. How many times have you testified before House and Senate committees on the subject of consolidation?

Commissioner HALL. I should hesitate to say, offhand, but it has been almost every year ever since 1922, perhaps, or somewhere around there.

The CHAIRMAN. When did the Interstate Commerce Commission first give attention to the question of consolidation?

Commissioner HALL. I can not say definitely when it was first considered, but I remember that in 1919 the commission, which was at that time represented before the House committee by former Chairman Clark, laid before that committee in the form of a draft of a bill its conception of what was needed in connection with the provision providing for consolidation. Of course those original suggestions have been amplified and carried into, you might say, other fields. Senator Cummins was very greatly interested in that subject.

Or existing statute in that regard is, so to speak, a compromise between the views of the House and the views of the Senate and was worked out in conference between those who were delegated to confer on that subject representing the Senate and House, and the Senator was desirous of seeing amendments and modifications of the existing bill. He himself introduced, as I recall it, several bills in the Senate looking to that end.

In fact, the need for some modification of it has been recognized by the President in repeated annual messages and evidenced by the introduction of a number of bills both in this body and in the House.

To put it very briefly I may say that I have had occasion to examine and consider all of those measures as introduced, and I can sum up my view by saying that the Fess bill now pending here, with the modifications which are suggested in the text just distributed and now lying before you, represents, to my mind, the most desirable and the most workable modification of the existing law on the subject of unification of carriers and carrier properties that has yet been forthcoming. And it is therefore to that text which has just been circulated that, for convenience, I would like to address myself, if that be agreeable to the members of the committee.

The CHAIRMAN. Certainly.

Senator FESS. There was no effort at legislation on unification prior to 1920, was there? That was the first?

Commissioner HALL. I do not recall that there was. I think possibly the experience of the country and of the carriers during the period of Federal control led to a study of what advantages might be anticipated from a provision for further unification of railroad properties; the conception being that if the existing railroad properties

the major properties, were allowed to become systems we should have a more adequate transportation service in the country, more readily subject to regulation under the authority of Congress, with increased efficiency and a tendency toward decreased cost to the public.

Senator FESS. In your discussion this morning will you develop the need of amendment to the 1920 act, in view of the fact that there is a feeling in certain sections that there is no need of further legislation on the matter and that we could proceed under the present law of 1920?

My understanding has been that the commission has found it rather impossible to proceed, and that accounts largely for this effort at new legislation. Will you discuss that in the matter that you are going to discuss?

Commissioner HALL. I shall be glad to do so, Senator, and will try to do so briefly.

The existing provisions as to unification—I use that broader term—are found in section 5 of the interstate commerce act. The only part of section 5 which has been found available for the purposes of unification thus far has been paragraph 2 of section 5 which provides for the acquisition of control either through stock ownership, lease, or otherwise, by one carrier of another carrier under certain conditions responding to certain calls laid out in paragraph 2 of section 5, provided if this process should fall short of consolidation.

Then in the succeeding sections of the statute there are provisions for consolidation. The commission is required to prepare and put out a tentative plan of consolidation and may, after a stage, provide that hearings shall close, and later it is to put out a complete plan of consolidation.

That consolidation, as it is termed in the statute as distinguished from acquisition or control under paragraph 2 of section 5, contemplates only one of the various forms of consolidation of the aggregation of carriers and carrier properties that historically have been used in the building up of the systems that we have in this country to-day.

To illustrate, the Pennsylvania system, so called, consisted of what were formerly some 600 different corporations and different railway properties, and now consists of something like 70 distinct corporations——

The CHAIRMAN. Seventy now.

Commissioner HALL. Something like that.

What is true of that system is true of the other systems, although not perhaps the same figures, but in the same sense.

All those methods in the existing provisions as to consolidation are disregarded except the one method where a corporation owns as well as operates, or operates as well as owns, railway properties which theretofore were in separate ownership and under separate operation.

In other words, acquisition of control through lease, use of rails through trackage rights, and acquisition of control through purchase of capital stock are excluded from this contemplated consolidation.

The commission was called upon to work out some plan which would result in the building up of systems where properties in each system should be owned by one corporation and operated by that same corporation. That injected a regidity into the problem which is not inherent, which does not belong there, and is counter to the historical development of our systems in this country. When you recall that

in Lincoln's time there were only about 30,000 miles of railroad in the United States, approximately the mileage which is now represented by the Short Line Association, and that mileage has now grown to 250,000 miles, the more important part of the traffic of the country being carried in what are recognized as systems which have grown up partly through acquisition of control through purchase of stock, partly through lease and in various other ways, it seemed unnecessary to start on this program of consolidation by saying that whatever went into a system had got to be owned and operated by the same corporation; and of course as each additional railway property was added to a given system it would necessitate quite a modification in the case of that particular corporation.

The intent of section 5 is quite plain, that where consolidation is effected in accordance with the statute to the extent that it may be necessary to carry out that consolidation, the parties to it should be relieved from the straits of the anti-trust laws, contrary statutes and constitutions of the States which prohibit consolidation of parallel or competing roads, and other restraints which have heretofore restricted, at least, the directions in which these systems should grow and develop.

The manifest intent was to remove obstacles, but unwittingly perhaps, quite clearly in the light of experience, new obstacles which did not previously exist were injected into the statute—to one of them I have already referred—that are restricting consolidation to one form, and that the least used form, historically, of any known to those who are engaged in transportation.

The result was that any progress along this line was arrested until the commission should have prepared and promulgated a complete plan. That complete plan was to embrace the railway properties of the United States. It did not say all the railway properties of the United States, but it did not in its terms permit any exclusion. That complete plan, therefore, would have to contemplate that the railway properties of the United States through this one form of consolidation should be built up into systems, and all voluntarily, because there was no compulsion about it.

The construction of those systems must be in accordance with and in furtherance of the complete plan.

There was provision for application to the commission, of proposals for such consolidation and creation of such systems.

The next obstacle that stands out in the existing statute is that as soon as the commission receives such application it should proceed under our valuation section 19–A to determine the value of the carrier's properties that would enter into that system. Section 19–A of our valuation statute as thus far construed provides a process for arriving at the rate-making value of the railway properties of the United States. That rate-making value might be a very different thing from the values to be attached to the various properties in a consolidated system, because under this consolidation provision the capitalization of that system was to be measured by that value. None of us as yet knows with certainty what 19–A requires. That has been what we have attempted to do under that section of our act; and it has been before the courts and is still. In two or three instances we got no light from the courts, as, for example, in what is

81538—28—PT 1——3

known as the San Pedro case, because the Supreme Court found that the matter of valuation had not yet reached a stage where it was justiciable.

The act of 1920 provided for recapture, and the provisions with regard to recapture have been applied by the commission in the O'Fallon case. That also is on its way to the Supreme Court.

The recapture provisions would call for bringing a valuation down to the date of the period when the recapture of one-half of the net return in excess of 6 per cent would be made.

This provision in the consolidation statute to which I am referring would require us to arrive at present value for purposes of present capitalization of the system, proposals with respect to which are lying before the committee. It would therefore require bringing that value down not only to 1924 or 1925, or whatever the recapture period was; it would require bringing it down to the immediate present or the imminent future. It does not seem to take into account, further, the value of property not devoted to common carrier purposes but which might be owned by the carriers seeking to enter into the system.

To illustrate how important an item that sometimes is as bearing on capitalization, I might revert to the fact previously mentioned before this committee that during the period of Federal control the New York Central system had an income of over $10,000,000 annually outside of what it received or was entitled to receive from the Director General of Railroads. In other words, that property which did not pass into Federal control and was not operated by the Government was of such value that it yielded an income of $10,000,000. Such property as that certainly ought to be taken into account when you are arriving at capitalization of a new system.

There therefore was a provision which, if not ultimately an obstacle, was certainly of a nature to arrest progress for several years. We found by experience that a value of that kind can not be finally determined even if we knew exactly what the value meant and what value was intended, whether for rate-making purposes or some other purpose. Value can not be determined for two or three years. It does not facilitate consolidation or any other process of unification if the matter is to be tied up during two or three years, or whatever the period might be, until the commission could ascertain and sustain its idea of total capitalization.

The CHAIRMAN. How does this bill deal with that problem?

Commissioner HALL. It eliminates it.

The CHAIRMAN. It eliminates it absolutely, does it?

Commissioner HALL. Yes.

Mr. FESS. I wanted the commissioner to make that statement, because there are several new members on the committee.

The CHAIRMAN. Yes; I wanted him to make it, too; and then I wanted to ask him the point blank question, How would you eliminate it or deal with the new proposition?

Commissioner HALL. There was a mandate laid upon the commission to proceed to put out a complete plan. The commission held hearings running over a couple of years. It accumulated a most valuable record, a historical monument, in fact. It is a picture of what the railroads were of this country during the years 1920 to 1922 or 1923, but we have found it impracticable to prepare a complete

plan, using only that method under which consolidation would take the form of one corporation owning what it operated and operating what it owned. We have found it impracticable to put out such a complete plan. That was quite early made manifest. It was as well known to Senator Cummins as it was to any Member of either House.

It has been the desire, I think, of those who were impressed with the advantages that might reasonably be contemplated as coming through further unification of properties to remove existing obstacles to such unification. It has been the desire to see the act modified so as to make it more workable in that respect, rather than to see this commssion put out, I think, an impossible product. We found it impossible to put it out and a futile thing when it was put out.

I have touched upon some of the obstacles that stand out in that act.

There is an omission that, to the carriers, is somewhat of equal importance, and that is the lack of provision for Federal machinery in the corporate operation of these various existing carriers to bring about what it was plainly desired by the statute to facilitate; that is to say, the further unification.

The question in their minds has been, How can carriers organized under the laws of a State, with statutory provisions in that State as to how their stockholders' meetings and directors' meetings, and so on, shall be held—how can they take that machinery and use it for a purpose that is prohibited by the constitution of that State?

Therefore it seemed desirable to them that there should be some enabling act, in a way, an enabling provision which would prescribe the machinery that would be used by this corporation as such in carrying out what seemed to be the manifest intent of Congress, namely, that they should, if they met the requirements of the statute and the approval of the commission, be permitted to grow as others had grown into systems.

The CHAIRMAN. How many States have those prohibitory constitutions?

Commissioner HALL. I would say that all of the Western States, just offhand, from Illinois on, have them. Our constitutions in the West are very largely drawn from Illinois. I am speaking in the rough. Just how many of the States in the East or in the South have constitutional provisions prohibiting consolidation in any form of parallel or competing lines, I do not know.

But we do know that the New York Central is operating railroads, one on the east side of the Hudson and the other on the west side of the Hudson, one called the New York Central and the other called the West Shore, and apparently that does not conflict with the laws of New York or New Jersey. I have not looked into that matter, but I know it is a matter of fact that they are operating.

I referred to the obstacles and the omissions. The Fess bill with the modifications that are suggested in italics, or through brackets indicating omission——

The CHAIRMAN. May I ask a general question right there? Would it interrupt you?

Commissioner HALL. Oh, no.

The CHAIRMAN. You have been for many years considering this question as a member of the Interstate Commerce Commission, and

the Interstate Commerce Commission generally has been considering this question for many years?

Commissioner HALL. Yes; actively since 1920.

The CHAIRMAN. Is it your belief and is it the belief of the Interstate Commerce Commission that consolidations of railroads should take place in the United States within certain prescribed limits?

Commissioner HALL. We think they should be permitted. We do not think they should be required; and we think that there should be reasonable provision enabling them to do so.

The CHAIRMAN. Then you do not believe that that requirement would be met by the provisions of the existing law?

Commissioner HALL. Oh, no; there is nothing mandatory in the existing law except that properties in one system can not go into another system unless the plan is changed.

The CHAIRMAN. But may the system of consolidation in which you as a member of the commission believe and in which the commission generally believes—may that take place under the provisions of the existing law, or are some modifications necessary as suggested in the pending measure?

Commissioner HALL. I am personally convinced and, so far as I know, that view is shared by the rest of the commission, that modification of the existing law is imperative if anything is to be done under it. I am referring now to the consolidation paragraphs of the act, because we are proceeding under paragraph 2 of section 5 in dealing with applications for acquisition of control; and that is the only way in which unification, to use the more general term, has been able to proceed since 1920, with one exception. In the case of the Nickel Plate there was consolidation under State laws, and when we came to pass on the issuance of securities we found that the consolidation was for a lawful purpose.

I turn, therefore, to this print which has been circulated this morning as representing the best solution which has yet been brought forward by either the House committee or the Senate committee. I have been discussing what would be the same resulting text before the House committee, so that what I have to say to you is very much what I have had to say there.

The print deals with the text of S. 4892, which was introduced by Mr. Fess on December 17, 1926. I have understood that that was identical with the confidential committee print No. 1, of the House, which represented the stage at which the House committee had arrived in consideration of the then Parker bill. There has since been another Parker bill which was introduced on March 3; and Senator Fess has introduced S. 1175, dated December 6, 1927.

This Senate bill 1175 I have not seen until this morning, but I understand from what Senator Fess said a little while ago that it is substantially the same as S. 4892 which was introduced and the text of which appears in this print circulated by Colonel Thom this morning.

The changes which appear on page 2 in italics are changes in the names of the titles. Title I is to be applied to the existing interstate commerce act and properly may indicate that it deals with regulatory provisions, but of a general nature.

Title II which I will now consider also, it seems to me, deals with regulatory provisions, although devoted to unification of carriers.

The power of the Congress to deal with the instrumentalities of interstate and foreign commerce is drawn in the main, if not entirely, from what is known as the commerce clause of the Constitution which provides for regulation; and if the subject of unification of carriers is properly one for legislation by Congress and for administration by the commission, it also must be an incident, and I think it is essentially an incident, of the regulation of interstate and foreign commerce. Therefore the substitution as a title of the words "Regulatory provisions—Unification of carriers" for the words in the Fess bill as it now stands, "Unification of carriers," is in the interest of clarification and it eliminates the suggestion that in this Title II the Congress is going outside of or beyond the commerce clause of the Constitution.

On this same page 2 there is some modification in italics of the definitions appearing in the Fess bill. Those modifications clarify and seem to me to be desirable.

The same may be said of the change in italics which appears on page 3. In line 13 of page 3 there is a substitution which runs throughout the bill of the word "stock" for the phrase "voting securities" which is used in the Fess bill. That seems to me a desirable change. Voting securities would include various evidences of indebtedness. The holders of those securities are creditors of the corporation. Those who hold its stock are in a sense the owners of the corporation.

Senator FESS. The term "stock" is more limited than the term "voting securities"?

Commissioner HALL. Oh, yes. It eliminates all those who are merely creditors and includes those who have to the extent they have gone in it to state the extent of their success or failure as an operating concern of the carrier. The creditor ordinarily relies upon the security that it has. But these stockholders are in a sense partners; they are really the owners; they have what is left after the debts are paid, and no creditor is really entitled to much more than to have its debt paid, with interest. So that seems to me, in the interest of simplification, a very desirable provision, because those who have entered into a carrier as stockholders, to my point of view, have a different say as to whether that corporation should be merged or unified into one of the forms here contemplated with some other corporation than have the creditors of the existing corporation whose claims can be satisfied when the debts to them are paid. That substitution runs through the entire bill, but it is first declared here.

On page 4 appear in italics certain provisions under the head of "Authority for unifications." This in the existing Fess bill is called a declaration policy. There are opportunities for certain controversies in the provision of either section and under either head.

The CHAIRMAN. I understand that the whole clause has the declaration policy stricken out and this other substituted under the heading of "Authority for unifications."

Commissioner HALL. That is right, and if it is agreeable to the committee I would prefer to revert to this after I have run through the succeeding sections, because we might be led into a little discussion. For the moment I only want to comment upon the words "or other property," which appear at the top of page 6, lines 1 and 2.

This contemplates, as you will observe, an exception. You will find that exception beginning in line 15 on page 5, where it says:

but the provisions of this title shall not be held to prohibit * * * (*a*) the acquisition by any carrier of securities issued by another carrier in an amount not sufficient to constitute control of such other carrier, or (*b*) the acquisition by a carrier of additional securities issued by another carrier of which control has been previously lawfully acquired, or (*c*) the formation of a subsidiary corporation, and the acquisition of all or any part of the securities thereof, for the construction, use, ownership, or control of branches, terminals, or other property.

Now, that phrase "or other property," as I have mentioned in the hearing before the House committee, is about as comprehensive as any phrase you can find. As far as words go it would cover the entire property of the Pennsylvania or the New York Central, and it would seem to me that the draftsmen who will give this final shape ought to qualify those words "or other property" so as to restrict it to such property as might be accessorial or rounding out what was already acquired. I take it that that is the intent, but the words go further.

Mr. THOM. There are qualifying words there, Mr. Commissioner, that that is all to be done, if done at all, for the carriers by power conferred by State authorities and in accordance with State law.

Commissioner HALL. Yes; that is quite true, and perhaps my illustration of the Pennsylvania or the New York Central would not be good; but I think we will recognize that the words "or other property" could with advantage be qualified somewhat.

Mr. THOM. In reading it you did not call attention to those qualifying words which I thought it desirable to have in the minds of the members of the committee.

Commissioner HALL. They are important words.

Senator FESS. Have you any suggestion as to the qualifying words, Mr. Commissioner?

Commissioner HALL. No; I have not framed that. My idea was, as I got it, that this should be accessorial property or rounding out in some way of what was already there, and the reference to the exercisable power conferred by State authority in accordance with State laws would seem to emphasize that idea, because the States, although some are large, are none of them large enough to embrace what we call systems.

The CHAIRMAN. As far as you have gone with consolidations by the action of the Interstate Commerce Commission, have you come in conflict with the State authorities to any considerable degree?

Commissioner HALL. In regard to the acquisition of control we have approved such acquisitions where they were strongly objected to by State authorities, the attorney general of Texas, for example, appearing in the opposition. I do not recall at this moment any important litigation that has grown out of that action on the part of the commission.

The CHAIRMAN. That is to say, that notwithstanding the objection of the attorney general of Texas you approved the consolidation proposed at that time?

Commissioner HALL. Acquisition of control under paragraph 2 of section 5, yes. Our record justified and nothing stood in the way except the statute or the constitution of the State, and we have felt

that under the existing provision of the Federal law we could not be controlled by that State obstacle.

I have commented before the House committee on the word "lease" in line 24 on page 6. I do not quite understand how one would acquire securities by lease. That may be an incident to the acquisition by lease of the properties of a carrier and in connection with the properties so acquired—I mean rail properties—there might be some securities held by the lessor which would be put under some paragraph in the lease. However, I do not quite understand how one acquires securities by lease, and perhaps that word could be explained. I have no doubt Colonel Thom can explain it.

Passing now to page 7, the first three lines in italics, reading: "Nothing in this title shall be construed to authorize or provide for the creation, directly or indirectly, of any Federal or national corporation; and" seem to me unnecessary. I do not find anything in this title that could be so construed, and I do not see why it is necessary to make that declaration.

Senator FESS. In our hearings at the close of the last session there were parties interested in that particular phase and rather objected to the bill then pending on the ground that it did permit Federal incorporation. It was contended here that it did not, but the parties were quite persistent in it, and I assumed that that was why this was put in.

Commissioner HALL. That may be true, and I have no objection to it except that it suggests that this bill is providing for incorporation. You will recall that in one of the bills introduced by Senator Cummins the second part of it was quite a complete provision for Federal incorporation.

The CHAIRMAN. That is quite true, but the committee did not agree to that.

Commissioner HALL. Well, that has disappeared. There is none of it here. It seems to me unnecessary to profess that there is nothing here providing for incorporation under the Federal law when a reading of the text shows that there is nothing to provide. I would not know how to come here to Congress and seek to incorporate a Federal railroad under this bill. I would not know where to begin.

The CHAIRMAN. Inasmuch as it is a mere negation, it makes no difference, does it?

Commissioner HALL. I am not certain. Sometimes negations suggest doubt in the minds of the Congress as to whether after all the other provisions do not provide for Federal incorporation.

The CHAIRMAN. But you think there is nothing in this bill that does provide, either directly of indirectly, or by inference for Federal incorporation of railroads?

Commissioner HALL. No; I have not found it.

Senator FESS. That was the opinion of the committee; that is, those who expressed themselves; but, as you know, Mr. Chairman, there was a witness here that rather insisted that it was in there, and, while he did not convince me, this was put in to alleviate that opposition. I agree with the commissioner that it may be paying a pretty high price. I take if from what the commissioner has just now said that he fears the possibility of any consolidation under the provisions for consolidation with this in it.

Commissioner HALL. I would rather see it out. I do not think I would put it any more strongly than that. I do not think it adds anything. I would rather see the paragraph begin in line 5, capitalizing the letter "a" in the word "all," so it would begin, "All the powers, rights," etc., and continue as it runs down to and including line 11.

Mr. THOM. Mr. Chairman, may I say a word in explanation?

The CHAIRMAN. With the permission of Mr. Hall.

Commissioner HALL. Surely.

Mr. THOM. At the hearing to which Senator Fess has referred the State commissions, acting through their counsel, presented the view that inasmuch as a technical consolidation resulted as a matter of law in a new corporation, and inasmuch as that resulted under a Federal statute, that new corporation, according to their view, might be considered as a creation of a Federal corporation, and they objected very much to that consequence. I agreed with Senator Fess. I do not think there is any danger from that, but this was put in to meet that view of the State commissions.

Senator WAGNER. May I ask just a question or two, Mr. Chairman?

The CHAIRMAN. Certainly.

Senator WAGNER. If this were incorporated into the law and sometime subsequently Congress should amend the law by omitting this provision, may not that be construced as an intent by Congress to permit consolidation?

Commissioner HALL. There certainly would be some one who would suggest that. As to the policy of putting such things as this into the statute, I am reminded of the old story of the mother going away and having to leave her children for half an hour or so and saying to them, "Whatever you do, do not put beans in your ears." Well, they had never thought of putting beans in their ears and when she came back she found the children had beans there. I would leave it out. As I have indicated, it does not seem to me to be material.

The change in the subtitle of section 204 of "Procedure" to "Joint agreement and petition" seems to me desirable in that section 204, but the other sections deal with procedure, and there is no reason why this particular one should be singled out as the one relating to procedure. Therefore the italic change there is one which seems desirable.

In line 16, after the word "authorized" I have suggested that there should be inserted the words "and the carriers have executed." The boards of directors would hardly authorize under their respective corporate seals, etc., the element of authorization by the board.

The CHAIRMAN. What is it that you suggest?

Commissioner HALL. Insert the words "and the carriers have executed" after the word "authorized" in line 16.

The insertion in italic in lines 19 and 20 seems to me very desirable. It may be found desirable that the petition or the plan should be amended, and if it is provided that that should be by leave of the commission it seems to me that such provision is sufficiently safeguarded.

If the change which I have suggested in line 16 on page 7 is made, a corresponding change in line 13 on page 8 would be the substitution of the word "executed" for the words "entered into."

On page 9 the paragraph beginning with "(2)" in italics does not plainly indicate whether it is confined to cases of intended unification. If it is not, I do not quite know why it should be here. Those who framed this substitute can perhaps clarify and certainly explain the office that it is intended to fulfill. If it is not confined to cases of intended unification, I do not see why there should be, say, an application, in the first place, and then a hearing and an order.

The CHAIRMAN. Perhaps Mr. Thom can explain that right now.

Mr. THOM. You would like to have me explain that now, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. THOM. That was put in there at the instance of certain carriers who, without going to the extent of a unification at the moment, might desire the additional securities if that acquisition were approved by the commission, and that not necessarily to be a direct and immediate unification, but it might be desirable as a preparation ultimately for one, and that might or might not ultimately take place; but it was considered to be a desirable power to possess and could be safely exercised if it is approved by the commission after a hearing.

Senator PITTMAN. That would be to allow them to purchase control of another company?

Mr. THOM. If approved by the commissioner.

Commissioner HALL. Do you mean that? Do you mean under that paragraph 1 to acquire control of another company?

Mr. THOM. It does not limit it not to. There is no limitation on the additional security.

Commissioner HALL. How about the provisions notifying governors of the States and all the rest?

Mr. THOM. That is all provided for under such rules and regulations as you may prescribe. I will have on the stand during the hearings a gentleman who has a special interest in that section and at whose suggestion it was inserted.

Commissioner HALL. It would seem to cover such a case as the Union Pacific, for example, which has had occasion or has seen fit to buy up equipment trust certificates of various other carriers. It can do so now. If it owns any securities issued by, let us say, the Baltimore & Ohio and wants to pick up some equipment trust certificates in respect to the rolling stock of the Baltimore & Ohio, is it the implication that to acquire those additional securities the Union Pacific has to come to the commission with an application for a hearing? As far as I know, it can buy them in the open market now. I merely raise these queries because I do not fully understand the scope of this.

The CHAIRMAN. Is that clause an essential inference of the plan of consolidation?

Commissioner HALL. Mr. Thom says he will have a witness who will explain its need.

The CHAIRMAN. It looks like it is a kind of preliminary step to some other step to be taken hereafter.

Mr. THOM. It is supposed that paragraph 1 of section 205, Mr. Chairman, would negative this general power which the commission has referred to, unless expressly reserved in paragraph 2.

Senator FESS. I do not recall the contention on that paragraph at all.

Mr. THOM. There has been no contention before this committee on the subject. This is the first time it has been presented here.

Commissioner HALL. That is probably something that can be presented later. I am no sufficiently advised as to the need for it further than to raise this query.

May I call your attention to page 10 and to the part that is in italics; beginning first with section 207:

> If, after such hearing, the commission is of the opinion that the proposed unification will be in accordance with the provisions of section 202, and finds that such provisions of this title as are conditions precedent to the entry of the order have been complied with, the commission shall enter an order approving the plan.

This text does not say at all what provisions of this title are "conditions precedent," but required us to find that whatever they are they have been complied with. We have to cast that in the form of a finding. I do not know whether the words "conditions precedent" refer to jurisdictional prerequisites. The term "conditions precedent" is frequently in the law of contracts. I do not recall its use in connection with the findings upon which an order rests.

There are various provisions of this title. Some have to deal with the case where two or more carriers agree upon a plan, say, for consolidation or merger. You will find those listed on page 6. The paragraph beginning "(*b*)" is a corporate merger.

The CHAIRMAN. It is pretty difficult for the members of the committee to have any idea about the construction of this. We never saw it until this morning. We have not even read it.

Commissioner HALL. I have just been discussing the corresponding text before the House Committee, and it seemed to me that perhaps what little I have to submit might be more useful if I address it to the proposed modification as well as to the existing Fess bill.

Senator PITTMAN. It certainly seems so to me, Mr. Chairman. I think it is a great help to have Mr. Hall here to give his views.

The CHAIRMAN. It certainly is. You have read these all over, of course, Mr. Hall, and are familiar with them.

Commissioner HALL. Yes; I have. Touching further on this finding by us that these "conditions precedent" have been complied with, I call your attention to two lines on page 5, lines 13 and 14—"unlawful, unless such unification is in accordance with the provisions of this title or with an order of the commission." By that revision I should say, whatever our finding, if the unification was not in accordance with the provisions of this title or with an order of the commission it would be unlawful, just as the statute says, and that our finding would not change a fact.

If you will turn to page 19, line 5, you will find again these words "conditions precedent" to the entry of such order and such certification. Those words are in a paragraph which begins on line 23 of page 18. There it says that—

> The entry of an order by the commission under this title and the certification by the commission under section 209 shall be conclusive evidence that the carriers designated in such order, and their boards of directors and stockholders, have complied with the provisions of this title which are applicable to such carriers, boards of directors, and stockholders and which are conditions precedent to the entry of such order and such certification.

As a member of the body that will have to deal with this and act under it, I would like to have it made plain, if that term "conditions precedent" is to be retained, which of this title are "conditions precedent" and which are not; and it seems to me that there is a certain amount of conflict between a provision that the entry of our order shall be conclusive evidence that it is so and the provision that I have referred to on page 5 that the unification would be unlawful unless such unification is in accordance with the provisions of this order or with an order of the commission. I will not anticipate what I shall have to say later about that phrase as to conclusive evidence, but we are not accustomed to the conception that orders made by us or findings made by us are conclusive evidence; ordinarily prima facie evidence made so by statute with one exception in the Clayton Act that I will refer to later.

Senator FESS. Have you any suggestion as to what should be omitted, or is it a question of the entire amendment proposed here?

Commissioner HALL. No; it is not the entire amendment. I should observe, perhaps, Senator, that in our work customarily we only find what is in issue. That is to say, we begin our report by stating who are the parties and what are the issues and what are the contentions, and we deal with those as we go through, and at the end we find that the rates are unreasonable or reasonable or unduly prejudicial or whatever it is; but we do not find that the carriers there defendant have complied with all the provisions of the interstate commerce act or that the complainants have or that we have acted arbitrarily can be determined in the court if that issue is raised, but we do not affirmatively set out that the parties who are there before us have complied with everything that the statute calls for. We do not see occasion to do it here. This does not profess to require us to do it for everything that the statute calls for. It calls for us to consider conditions that are precedent and the conditions that are not, and I do not know. I do not want to be left in doubt about that, but if we are to find which are conditions precedent I think the statute itself ought to tell us which are in order that we can make that finding. It seems to me idle to make a finding, however, if the entry of our order is going to establish that the statute has been complied with.

Mr. THOM. Would it remove any of your difficulties if the word "find" in line 19 were changed to "is of opinion," and in line 20 be made to read "as are conditions precedent to the entry of the order"?

The CHAIRMAN. Read it the way you suggest it, Mr. Thom.

Mr. THOM. Page, 10 section 207 (1) commences:

> If, after such hearing, the commission is of the opinion that the proposed unification will be in accordance with the provisions of section 202, and finds that such provisions of this title as are conditions precedent to the entry of the order have been complied with.

Commissioner HALL. I do not see what you gain, Colonel Thom, over what is already there. It says, "If after such hearing, the commission is of the opinion that the proposed unification will be in accordance with the provisions of section 202." Why is it necessary to go further?

Mr. THOM. It is because there are certain things that the carrier must do before you are entitled to enter an order.

The CHAIRMAN. What do you man by "conditions precedent"?

Mr. THOM. Those things that in the act were required to be done by the carrier prior to the entry of the order had been done.

Senator PITTMAN. I do not see any particular objection to that phrase. The commissioner here would like to know what you mean by "conditions precedent," but the part there that seems to change the whole procedure is found on page 18, section 3, where they make the finding or the opinion, whatever you want to call it, conclusive evidence.

Mr. THOM. That will require some considerable interruption, Senator, for me to explain the reason for that, and I will undertake it when you hear me. I will say that that is connected with questions of titles. In a word, that is the reason it is there.

Commissioner HALL. Passing that, because I think it does need clarification and I will not linger on it longer, if you will turn to page 11 you will observe in the first line a provision beginning in italics—

and also, if the commission shall find upon objection of a stockholder of a carrier—

Observe that that is not necessarily a registered stockholder—

a party to the proposed plan of unification, that certain terms and conditions of said plan subject such stockholder to undue or unreasonable prejudice, then with such modifications of the plan, or upon such terms, conditions, and methods, as it may prescribe as necessary to remove or correct such prejudice.

I think there are members of the commission who would favor the inclusion of such a provision as that.

The CHAIRMAN. We did not get that up at this end of the table.

Commissioner HALL. Let me repeat, then. On page 11, beginning in line 1, is an addition in italics, reading:

and also, if the commission shall find upon objection of a stockholder of a carrier—

Let me interpolate there that later on there is a provision as to the rights of registered stockholders, as they are defined, but here it simply says a stockholder. I resume the quotation:

a party to the proposed plan of unification, that certain terms and conditions of said plan subject such stockholder to undue or unreasonable prejudice, then with such modifications of the plan, or upon such terms, conditions, and methods, as it may prescribe as necessary to remove or correct such prejudice.

Now, let me say that if it develops before the commission that there was an inherent injustice as to one set of stockholders against another, that really would go to the merits of the plan. The commission would be bound to consider that in arriving at its conclusion as to whether the plan should be approved or not. It does not seem to me that this act should be made a vehicle for adjusting private controversies as between one set of individual investors and another. I only mention that in passing.

Senator HAWES. Before you leave page 11, Mr. Commissioner, there is some objection on the part of roads in my State to the language put in brackets in lines 8 and 9. Do you desire to discuss that in any way at this time?

Commissioner HALL. You are referring to the sentence reading:

If the order of the commission (whether or not any intervenor's petition has been filed) imposes as a condition to the approval of the proposed unification that a carrier not joining in filing the petition be made a party to the unification, the carriers filing the petition may report to the commission the efforts made by them to comply with the condition; and if, after hearing, the commission is of opinion that the carrier that is to be made a party is insisting on ureasonable terms, the commission may revoke or modify the condition, (or) if requested to do so by such carrier, may prescribe the terms on which the carrier may be made a party to the proposed unification.

I do not see that the word in parentheses, to which you are referring, are objectionable, "whether or not any intervenor's petition has been filed." In other words, in trying to deal with the inherent fairness of this plan, why should the commission be stalled if it develops in the course of the hearing that such a situation exists but it also develops that no intervenor's petition has been filed? It seems to be contemplated that the commission shall require that a party that apparently would be affected should be brought in. In fact, the commission could at any stage of a proceeding, if it were necessary, afford opportunity for another party to be brought in.

The CHAIRMAN. Gentlemen, it will be necessary for us to recess now until to-morrow morning. Mr. Commissioner, I trust it will not unduly inconvenience you to return to-morrow at the same hour. We will adjourn now until to-morrow morning at 10 o'clock.

(Thereupon, at 12 o'clock noon, the committee adjourned until 10 o'clock a. m., January 10, 1928.)

CONSOLIDATION OF RAILWAY PROPERTIES

TUESDAY, JANUARY 10, 1928

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10.30 o'clock a. m., in the committee room, Capitol Building, Hon. James E. Watson, chairman, presiding.

Present: Senators Watson (chairman), Couzens, Fess, Metcalf, Mayfield, Hawes, Black, and Wagner.

The CHAIRMAN. Commissioner Hall, if you are ready you may proceed now.

STATEMENT OF HON. HENRY C. HALL, INTERSTATE COMMERCE COMMISSION, WASHINGTON, D. C.—Resumed

Commissioner HALL. I think when I discontinued yesterday we were on page 11 of this print showing the amendments proposed by the law committee of the Association of Railway Executives, November 15, 1927, and a question had been asked with reference to the words appearing in parentheses in lines 8 and 9 on that page, the words in parentheses reading, "whether or not any intervenor's petition has been filed." The reference in parentheses is to the provision contained in paragraph 2 of section 206, on page 9, beginning at line 24.

Mr. THOM. I think it is paragraph 3 on page 10, Mr. Commissioner.

Commissioner HALL. You are right; it is in paragraph 3 beginning with line 7 on page 10. This paragraph reads:

> Prior to or at the time a petition is called for hearing, but not thereafter except for good cause shown, any carrier may file with the commission an intervenor's petition praying that it be made a party to the proposed unification.

That, you will observe, confines the would-be intervenor as to time to the period before the petition of the applicant, or applicants, is called for hearing, except for good cause shown it may thereafter be allowed to file an intervening petition.

There is also on page 9, in lines 20 to 23, being a part of paragraph 1 of section 206, a provision that, subject to such rules as the commission may prescribe, any other person having an interest shall be afforded a reasonable opportunity to be heard.

The CHAIRMAN. There is a difference, is there not, between an opportunity to be heard and an opportunity to intervene? It says any person having an interest shall be afforded a reasonable opportunity to be heard. Does that have reference to a right to intervene by petition?

Commissioner HALL. I have not so understood. In considering this text I have regarded the provision in paragraph 3 of that section as giving one a right to file an application to become a party to the proceeding in the form of a petition in intervention, and that limited as to time on or before the calling of the applicant's petition for hearing, the idea being, I assume, that whoever is allowed to intervene shall be bound by the record, whatever it may be, and the entire record.

It is conceivable that a short line, let us say, might feel uncertain as to whether to intervene at the outset and be bound by the entire record, but at some stage of the proceeding might think that in its interest it should be afforded a reasonable opportunity to offer evidence. I discussed that before the House committee as illustrative of the importance of the words which are here in italics on page 9, lines 20 and 21, reading, "subject to such rules as the commission may prescribe." It seemed important that the commission might, if such other person in a given instance chanced to be a short line or other carrier which might have intervened at the proper time, require that such other person, if it was afforded this opportunity to be heard, should not be able to contend that that part of the record already made was not conclusive as to it, because it had an opportunity to examine the witnesses, etc. In other words, the commission might with propriety require that if no one from that side sought to come in it must accept as part of the record in the case, all of which was to be considered in deciding the case, that portion which was already in the record before this other person sought an opportunity to be heard.

The CHAIRMAN. That is one of the rules that you mean by that language?

Commissioner HALL. That is one of the rules that we would naturally prescribe under those circumstances, and perhaps it would be covered by the words in line 22; but I think it is safer to do what is here done; that is, to insert in italics the words "subject to such rules as the commission may prescribe."

Now, in the public interest it is desired that the commission in dealing with one of these applications shall be able to have before it everything that may bear on the propriety of either granting the application or attaching certain conditions to that grant, or rejecting the application in the form in which it is presented, and one of those conditions which it might with propriety attach would be that the plan before it for consideration include some carrier in the same territory that was not covered by the application, but in the interest of adequate service in that region could be included in the unification here proposed, and that irrespective of whether the particular carrier had sought as an intervenor to come in or had sought at some subsequent stage a reasonable opportunity to be heard. For those reasons it seems to me that the words here in parentheses, with which I began, on page 11, lines 8 and 9, "whether or not any intervenor's petition has been filed," are appropriate words and should be there. It might affect the trading possibilities.

The CHAIRMAN. That is one of the very questions about which there is a controversy.

Commissioner HALL. From our point of view it is immaterial whether it affects the trading possibilities or not, because we have

to consider what in the long run is to be in the interest of the region served and of the public not only in that region but elsewhere.

The CHAIRMAN. Of course, that is one of the very controverted questions. For instance, here are two lines running, say, down to Norfolk, and here is another railroad between the two. Of course, some of these gentlemen want to say that the commission shall have no authority whatever to take that road in as a part of the system of either of those lines without the consent of that road.

Senator FESS. Unless the road wants to go in.

The CHAIRMAN. Unless the road consents. Let me ask you here, Mr. Hall, as a practical question, how you propose to force those stockholders of that little railroad to go into either system if they do not want to?

Commissioner HALL. It can not be done under this act.

The CHAIRMAN. Is there any act that can be formulated under which it can be cone?

Commissioner HALL. I do not know. Senator Cummins thought there could be some compulsion.

The CHAIRMAN. He and I never agreed on that. How can you force a stockholder to sell his stock if he does not want to?

Commissioner HALL. Under the principle of condemnation, I suppose, if shares of stock come under eminent domain.

The CHAIRMAN. What do you think about that, Colonel Thom?

Mr. THOM. The only way on earth to do it is by condemnation and you have to have somebody to pay that condemnation price. You can not force anybody to pay a condemnation price. That has to be a voluntary act.

Senator COUZENS. If we declare this policy of consolidation provided in section 202, is it your idea that a small stockholder can hold out and prevent the accomplishment of a public policy?

Mr. THOM. No.

Senator COUZENS. Then you may not be able to get that stock.

Mr. THOM. You can get it by condemnation.

The CHAIRMAN. But I want an explanation, because that question is asked over and over again on the floor and elsewhere. Two questions are asked. One is, how can you force a railroad to buy stock from another railroad if it does not want to, and the second is, how can you force a stockholder to sell his stock if he does not want to? Those are questions that are asked every day and we should be prepared to answer them. I understand the theory of condemnation of course.

Mr. THOM. Would it be appropriate here for me to say anything in response to Senator Couzens question?

The CHAIRMAN. Certainly.

Mr. THOM. There are two cases. One is where a number of roads come together and ask for the approval of their plan to unify and there are some stockholders in some of them that are to be taken in who do not want that to be done. That case is covered by this bill by the provision that the minority can not prevent that, but in that event those who want to carry through the unification shall have the obligation on them either to purchase or to condemn the deciding stock. It does not require any compulsion on the organization that intends to condemn that stock, because that is a voluntary act.

81538—28—PT 1——4

The CHAIRMAN. Suppose the majority do not want to sell?

Mr. THOM. If the majority do not want to sell and the majority do not want to condemn, there is no law on earth that will make a company acquire another company, or stock in another company, by condemnation, for the reason that you would have to have some medium of payment for that, and if that was not provided voluntarily I know of no way that the Government can acquire it.

Senator FESS. The result of that would be, Colonel Thom, that there would be no unification.

Mr. THOM. Yes; you are asking this witness this question: Here come a certain number of roads that ask for the approval of their plan to unify their property. The commission looks into the situation and it finds as to the port of Norfolk to which you alluded, Mr. Chairman, that the Pennsylvania Railroad controls the Norfolk & Western running into Norfolk and that the Van Sweringens control the Chesapeake & Ohio running into Norfolk. Now, suppose there was a third system that wanted to get into the port of Norfolk, such as the New York Central, and there was available the Virginian road which is the third running into Norfolk. This provision would authorize the commission to say to any proposal of the Pennsylvania to acquire the Virginian that, "It is not in the public interest to do that, and we will not approve your proposal unless you omit the Virginian." If the Van Sweringens should come in and say, "We want the Virginian," the commission should have the power of saying whether or not it should be excluded from them. And if the New York Central should come here and want to get into Norfolk and the Virginian was not asking to be made a part of that, the commission could say, "I will not approve what the New York Central asks unless the Virginian is included." Now that does not impose any compulsion on the Virginian because under section 208 it must consent before the order of the commission becomes effective. But the mere question, as I understand, that is being asked this witness is whether or not in the public interest there should be a power in the commission to so condition its approval that it will exclude or take in some road not asking to be excluded or taken in.

Senator COUZENS. Well, unless that is done it seems to me that it is inconsistent that the Congress declare a policy such as is indicated in section 202.

Mr. THOM. I think so. The history of these words is that they were originated by Senator Cummins and put in the act.

Senator COUZENS. I think if they should go through that way it is an error to have Congress declare a policy such as indicated in section 202.

Senator HAWES. Mr. Hall, is your opinion on this section your individual opinion or the opinion of all the members of the commission?

Commissioner HALL. It is my individual opinion, and, as far as I know, the opinion of all the members of the commission, although their attention has not been directed to this particular portion in parentheses; but it is their feeling when they receive an application for authority to unify that, if they see that an element is necessary in their conception to be added as a part of that unification, they may name that as a condition.

Senator HAWES. The objection to that, of course, seems to be that it would interfere with the trading opportunities and the purchasing opportunities of the consolidation.

Commissioner HALL. In other words, it would enhance the price.

Senator HAWES. And it would enhance the price unreasonably in the consolidation.

Commissioner HALL. That is taken care of here. Beginning with line 7 you will find the following:

> If the order of the commission imposes as a condition to the approval of the proposed unification that a carrier not joining in filing the petition be made a party to the unification, the carriers filing the petition may report to the commission the efforts made by them to comply with the condition; and if, after hearing, the commission is of opinion that the carrier that is to be made a party is insisting on unreasonable terms, the commission may revoke or modify the conditions—

And then in italics—

> or, if requested to do so by such carrier, may prescribe the terms on which the carrier may be made a party to the proposed unification.

Senator HAWES. Let me state a hypothetical case. A consolidation is suggested, say, in my own State of Missouri, and the commission suggests the inclusion of a certain road. Immediately the price of that road will advance; whereas, without that order it could possibly have been purchased to better interest to the stockholder of the main line around which the consolidation would be based. Now, what protection would they have other than that stated by you? If the road that you ordered to come in asked an unreasonable price, would the commission have authority to reduce that price?

Commissioner HALL. As worded here it would have authority to reduce it if the commission were requested to do so by the carrier to be brought in.

Senator HAWES. By the carrier to be brought in?

Commissioner HALL. Yes.

Senator HAWES. So that in case an unreasonable price were asked, that would be a matter of review by the commission, and if the carrier refused to make a reasonable price then your order of consolidation could be changed to omit that particular line?

Commissioner HALL. Yes; it is distinctly so provided in this bill.

Senator HAWES. That is your interpretation of it and the construction of the entire commission?

Commissioner HALL. So far as I know, it is. It certainly is mine.

Senator HAWES. So that the protection that the carrier would have in bringing a consolidation would be the judgment of the commission based upon an excessive price?

Commissioner HALL. It would have that and it would have more. The order of the commission never becomes effective until it is consented to by all carriers affected.

Senator HAWES. Yes; I understand that. Several of our roads in the West are skeptical and are inclined to be a little wabbly as to this provision, because they fear they may be forced to buy a road at a value far in excess of its real market price.

Commissioner HALL. Well, Senator, there is no one, I think, more concerned with seeing that the cost of these unifications, the acquisition of property, is not excessive than the commission itself. To that extent it puts an additional load upon commerce.

Senator HAWES. In case a road came in facing an excessive price and you ordered it in consolidation and it refused to lower that price, you would have no compulsory process to make them lower the price?

Commissioner HALL. No; but we can modify or revoke the condition.

Senator HAWES But in that case you could, and the commission would, in your judgment, eliminate that road from your proposed consolidation if it did not make a fair price?

Commissioner HALL. If the commission were of opinion that the road was insisting on unreasonable terms, I can say with entire confidence that the commission would not maintain that condition, because it would not require carriers to be brought into an aggregation on unreasonable terms. Opinions might differ as to what was reasonable or unreasonable, but I say if the commission were of opinion that unreasonable terms were being required it certainly would not require that carrier to be brought in, and I base that on experience.

Senator HAWES. And you again believe that you are now expressing the opinion of the commission as to this interpretation?

Commissioner HALL. Yes.

Senator COUZENS. There is one other question that I would like to have straightened out that the chairman raised that does not seem to have been satisfactorily answered. I refer to the language in parentheses on page 9, reading, "subject to such rules as the commission may prescribe," and in paragraph 3, on page 10, with regard to intervention. Do you consider those two provisions consistent?

Commissioner HALL. I think they can be made consistent with the words in italics there, and I am not sure but what they can be made consistent under the words "reasonable opportunity" in line 22 of section 9.

Senator COUZENS. Then, why put in paragraph 3, on page 10, if that language on page 9 covers the field?

Commissioner HALL. Why put in the language on page 10?

Senator COUZENS. Yes; the language in paragraph 3 on page 10.

Commissioner HALL. That seems to be important. There may be a unification proposed and from the very start some carrier not participating in that unification may desire to be allowed to intervene and be made a party to the proposed unification and urge all it can from the start that it be given the same status as those who are applicants. It seems to me that is a proper thing and might be a very desirable thing. For example, we have had recent experience along similar lines. The Delaware & Hudson applied to us, under paragraph 2 of section 5, to acquire control, through a lease, of the Buffalo, Rochester & Pittsburgh. Two other important carriers also, the New York Central and the Baltimore & Ohio, had been in negotiation with the Buffalo, Rochester & Pittsburgh.

If the project had been one for unification under this bill instead of what it was, an application to acquire control by lease under paragraph 2 of section 5, those two carriers might properly seek to be made interveners and urge their respective grounds for being allowed to acquire that control. As it was they appeared and opposed the application. That may not be a perfect illustration, but it certainly would be exceedingly helpful to the commission if

opportunity were afforded so that other interests, other carriers, that might want to get into the picture could from the start be on the status of those who sought to be a party to the proposed unification.

Senator COUZENS. The chairman raised the question as to whether or not you considered persons seeking a reasonable opportunity, referred to on page 9, and an intervener as in the same class.

Commissioner HALL. I think the intervener would be one among other persons, but there might be many other persons who are not carriers and who would not have been interveners. This language that is used on page 9, after referring to the carriers that are applicants, the governor notified or any representative of a State designated by him, goes on to provide that any other person having an interest might be afforded a reasonable opportunity to be heard. That would represent chambers of commerce and various commercial organizations.

Senator COUZENS. It might be an intervener under that term?

Commissioner HALL. No; because interveners would seek to be made parties to the proposed unification, and a chamber of commerce would not seek to be made a party.

Senator COUZENS. Then, you do not give an intervener the same opportunity under paragraph 3 on page 10 as you do in that portion referred to on page 9. In other words, the restrictions are more rigid against an intervener than against a person seeking to be heard.

Commissioner HALL. No; I think not, because if that application is made and granted the applicant is a party to the whole proceeding in a full sense.

Senator COUZENS. Yes; but he can only do it after a certain time unless, at the will of the commission, they may come in at some other time.

Commissioner HALL. For good cause shown; yes. It seemed to me at least desirable that a carrier desiring to be made a party to a proposed unification should come in at as early a stage of the proceeding as possible, and this continued that stage down to the time when the petition of the applicant is called for hearing, which, perhaps, is the very latest date that could be set for intervention, except where good cause is shown, and there is provision for that.

Senator COUZENS. That is a restriction that I am concerned about, because I can readily realize that in a case of this kind a short-line railroad, or some other railroad, might, after the development of the case, indicate certain conditions and desire to come in, and it would be entirely optional with the commission as to whether they would be permitted to come in as interveners. I think that should be in more specific language or the rule by which they might come in specified.

Mr. THOM. Perhaps I can explain that, Senator. Historically, paragraph 3 on page 10 was put in at the instance of the short lines, so as to give them an absolute right to become parties to the proceedings, irrespective of any consent on the part of the commission.

Senator COUZENS. I am only finding fault with the restriction as to time in which they might come in as interveners.

Mr. THOM. I will not at this time interrupt the proceedings to say anything on that subject, because I will be on the stand myself later. Any remark made by me was intended to be helpful from a

historical point of view. That was put in one of Senator Cummins's drafts.

Senator HAWES. Mr. Hall, I neglected to ask one question a moment ago. In case a situation arose where a road would be ordered into consolidation but it had an offer for a much higher price for its road under another combination, in what position would it leave the stockholders of that road? Have I made myself clear?

Commissioner HALL. I do not see any compulsion about the statute anywhere. If they do not assent, there is no party to a unification that is called in; nor does the order of the commission become effective until the consent of each carrier is arrived in the method provided for by this bill, and that has to be certified to the commission before it in turn can certify that the order is to become effective.

Senator HAWES. Well, this road would bring a high price if put into one combination and put into a combination that the commission might recommend at a low price. Would it be debarred from taking the high price in the other combination?

Commissioner HALL. I will put it a little differently. It certainly would not be compelled to come in at the low price. Whether it would be debarred from coming in to the other combination at the higher price would depend upon whether or not the plan met with the sanction of the commission when it got here.

The CHAIRMAN. And would be in the public interest?

Commissioner HALL. That is the criterion by which we are controlled. It is not the interest of the individuals.

Mr. THOM. May I ask a question, Mr. Chairman?

The CHAIRMAN. Certainly.

Mr. THOM. Let us take this concrete case. Suppose that the New York Central is already in the port of New York and in the city of New York. Suppose the Pennsylvania Railroad is likewise already in the port of New York and in the city of New York, and suppose that there was a short road that controlled a third entrance into New York and the Baltimore & Ohio desired to get into the city of New York and that short road controlling the third entrance received from the New York Central a large offer for its road in order to keep the Baltimore & Ohio out; or suppose it received a large offer from the Pennsylvania for the same purpose, or for any legitimate purpose. Is it the opinion of the commission that the power ought to exist in some public body to say whether that road controlling the third entrance into New York City should go into a combination with the New York Central, or should go into a combination with the Pennsylvania, or should be associated with some other system seeking an entrance to the port of New York?

Commissioner HALL. Beyond question it seems to me that power should be vested in some agency of Congress. I do not know where else it should be unless with the commission.

Mr. THOM. Is it or not your idea that the public interest absolutely requires that that power should rest somewhere in the Government?

Commissioner HALL. That is my view. In discussing this matter before you gentlemen I am not concerned with whether a stockholder can make more money in one way or another; I am concerned as to whether these unifications are in the public interest and found to be so, and if there is some condition that could be brought in in order to promote interests, I do not think the commission should be debarred by anything in the statute from making that a condition, always based on the idea that a commission charged with enforcing provisions of the statute as to what is reasonable in itself acts reasonably in making reasonable requirements.

The CHAIRMAN. Now, let me follow that up with another question that will be asked over and over again when we get on the floor. In the case suggested by Colonel Thom, that of a third road into New York City, suppose the commission should decide that it should be taken in as a part of the Pennsylvania system, and suppose every stockholder in that third line would refuse to sell. Can you by any power of eminent domain compel them to sell by condemnation?

Commissioner HALL. No, sir; not under this bill.

The CHAIRMAN. Can you under any bill?

Commissioner HALL. I do not think such a bill—and I speak with diffidence—would be constitutional.

The CHAIRMAN. What do you say as to that, Colonel Thom?

Mr. THOM. I do not know that the commissioner and I understand the question just alike. I say it would be competent, in my opinion, for Congress to confer upon the Pennsylvania the power to condemn that property and condemn all the stock of every stockholder in the property. That would be competent. It would be constitutional to do that. It would not be constitutional to force the Pennsylvania against its will to make the purchase; but if it wanted to make the purchase you could confer upon it the power to make that purchase.

The CHAIRMAN. That is, after the action of the commission?

Mr. THOM. Yes. You could confer upon it the power to make the purchase and in case it could not buy to condemn the stock of the road which the public interest required should be acquired.

Senator COUZENS. Does this bill make such a provision as that?

Mr. THOM. No, sir; it does not.

Senator FESS. That has been one of the objections to this bill, that it does not go to that extent.

The CHAIRMAN. That is a question that is going to be asked over and over again. The crux of the situation is whether or not we can proceed to unify railroad systems of the country without a provision of that kind.

Now, the question of policy for the committee to determine is whether or not we are to go forward with consolidation and unification of the railroad systems of the United States; and if that be the policy of the Government, whether or not we shall take the final step and put into this bill a provision conferring that power upon the roads that enter into a consolidation to compel another road to sell its stock at a price to be fixed by the commission.

Commissioner HALL. Mr. Chairman, I submit that the need for such a statute has not as yet been developed. The purpose, as I understand it, of this bill is to remove certain obstacles that perhaps unwittingly were injected into the existing consolidation statute, the purpose of that consolidation statute being, as I read it, to facilitate unification, to remove bars that had theretofore obtained, and to provide a reasonable method under which consolidations might proceed.

Now, it has not certainly in my mind been developed that there is need as yet for such power as that to which you just referred. This bill provides that at the end of seven years the commission is to report back to the Congress how far this process of unification has proceeded under this statute; and if in that period it should develop that there is need of such power, and if Mr. Thom is right in the existence of such a power in Congress, something that it can put into a statute, there will be time enough for it. It seems to me that at this stage when we are seeking to remove recognized obstacles it might suffice if we remove those obstacles, instead of undertaking to bring in what certainly savors of compulsion that does not exist now in the law and does not exist in this statute, except in so far as the power of condemnation has been given to take care of the minority.

The CHAIRMAN. In other words, you think it can be worked out by voluntary action?

Commissioner HALL. I think so, and if the need for that develops and Congress has the power, Congress is here and that power can be sought. The need has not developed as yet, but the need has developed for some such bill as this.

The CHAIRMAN. Are there any other questions on that point, Senators?

Senator FESS. It is my opinion that if we put a compulsory feature in we will not get legislation. There are so many conflicting interests that would think that that is taking away their rights.

The CHAIRMAN. I thought it was a proposition that we should consider momentarily, because we have threshed it out over and over again in this committee and never really came to any conclusion about it. Personally I have believed always in the unification of these railroad systems, and I believe we should confer any power or authority that is necessary to bring that about in the public interest. But the commissioner says that is not necessary at this time. If that be our view, then we can pass on and discuss it at greater length when we get into executive session. So you may proceed, Mr. Commissioner.

Commissioner HALL. In line with what I have said in regard to that parenthesis in line 9, on page 11, the deletion in lines 18 and 22 of what is there in the Fess bill seems to me likewise desirable. That is, there should not be any doors that are barred against the commission when it is seeking to arrive at what will be in the public interest in a proposed unification. Those words that are here deleted in lines 18 to 22 and which are in the Fess bill would say to us that there are certain features that we shall not consider. Now, as between the rights of individuals, I do not think we should act upon them; but in their bearing on whether or not the unification proposed is in the public interest and desirable and should be approved, they may have a bearing and we should not be excluded from taking them in consideration.

Senator COUZENS. Who proposed the exclusion?

Commissioner HALL. You will find it in the words beginning in line 18 and running to line 22 on page 11.

Senator COUZENS. You said they were deleted, did you not?

Commissioner HALL. I say they are deleted in this print, but they are in the Fess bill.

Senator COUZENS. And they ought to be deleted from the Fess bill?

Commissioner HALL. Yes; in my opinion.

Senator COUZENS. Yes; I agree with you.

The CHAIRMAN. That is to say, when you come to consider the public interest it is not any part of the consideration of the public interest to determine the price offered?

Commissioner HALL. What I mean to say is that there is not any phase of that problem which has a possible bearing on the public interest that should be excluded from our vision.

The CHAIRMAN. And that these words should not be deleted?

Commissioner HALL. No; they should be deleted.

Senator COUZENS. This restricts their opportunity to investigate.

Senator FESS. Every factor or condition that has a public interest should be within the comprehension of the commission.

Senator COUZENS. The author believes that portion should be deleted?

Commissioner HALL. Yes.

The CHAIRMAN. What was the object in putting that in parenthesis there, Colonel Thom?

Senator FESS. It was just to show that they are out.

Mr. THOM. Those brackets there indicate that we suggest that they be left out.

Commissioner HALL. I merely touch in passing upon the word in italics on line 24 of that page, the word "of" inserted before the word "weak," reading: "inclusion in the plan of short and of weak carriers." That emphasizes the fact that short lines are not necessarily weak and weak lines are not necessarily short. That has been referred to so much that I need not develop it.

On page 12 will be found in lines 1 to 4 a provision most of which is in the existing Fess bill. The provision begins over on the preceding page in line 25, reading:

and in order that the provisions of section 202 may be carried out, the commission is directed to make and have available for its use a study of the short and weak carriers.

Now, Mr. Chairman, I think those words should be omitted. We have been studying the short and the weak carriers and the strong and all the rest for 40 years or more. If we are required here to make a special study of the short carriers and also of the weak carriers, or if this be so intended of carriers that have both qualities, being both short and weak, we are treating them as a class by themselves; we are called upon to make a study of those carriers which we are not called upon to make of other carriers. That study, if it is worth anything, if it is deemed by the Congress as being a needed thing, should be done thoroughly. I do not know how long it would take. If the result of it were not available for a year or two or three years, in the interval those projects for unification which come before us would have to be decided without the benefit of that study, and only those which came after would have that benefit.

Senator COUZENS. Does not the language in italics there following from line 4 to line 6 qualify that?

Commissioner HALL. That qualification is exceedingly important That reads, "but without postponing for the purpose of any general study the consideration of and action upon any plan proposed under

this title." But if that is a needed thing, that we should make a study before we proceed to deal with any program of unification that includes or may include a short line or a weak line, is it not unfair to those who come first before that study has been made and as to which we deal without postponing for purposes of that general study? I other words, why should those who come later have a special provision made for them?

Senator COUZENS. In view of what you said about the commission having studied this problem for 40 years, could you not construe this language to mean that if you had already made a study you would not have to proceed to make another one?

Commissioner HALL. No; we are directed to do something that we have not already done apparently. Now, that study, of course, ought not to be used except as it is made a part of the record in so far as it has a bearing on the petition before us at the time; and whatever use could be successfully made of it seems to me could be supplied equally well by what the short or the weak carrier itself could put into that record.

Senator COUZENS. What was the object of the author in putting that in there?

Commissioner HALL. I do not know.

Mr. THOM. That was a concession to the weak lines that they wanted to emphasize in every way the relation of this legislation to them, and that is done in two ways: One is giving them the right to intervene that we have been discussing heretofore, and the other is that the commission could make a survey of that general situation and have it available as far as possible to pass on any of these subjects as they come in. That was done at their instance.

Senator COUZENS. I do not see any harm that would be done if that were deleted.

Mr. THOM. I have no objection to having it deleted.

Mr. CAIN (general counsel for the American short-line railroads). We would like to be heard, Mr. Chairman, before you reach any conclusion on that.

Senator FESS. It appears to be in a sense contradictory. In one place the commission is directed to make a study and in the other place the study is not to interfere with their progress on any particular application.

Mr. CAIN. We think in the interest of the public or in the corporate interest that that is important to be included, and I think it may be modified, so it is left to the discretion of the commission as to whether or not any study is necessary in a particular case.

Senator FESS. The assembling of any data on a matter of this kind is, of course, important.

Mr. THOM. Mr. Chairman, I do not construe this as it is being construed now. Here are two cases provided for. One is a general study of the whole weak-line situation; the other is the passing on an application which involves the possible inclusion of certain weak lines. There is nothing here that prevents the commission—in fact, there is every implication that the commission shall as to the latter case study that particular situation and master that in determining what they shall do; but that they shall not postpone that particular study until the general study of the whole weak-line situation is made.

Senator COUZENS. I think that language can be corrected so as to cover the suggestion made by Mr. Cain.

Senator FESS. We will make a note of that.

Commissioner HALL. If an opportunity is afforded a carrier, whether a short line or weak line or any other, to put in any evidence it chooses to adduce as bearing on a proposed unification, is not that all that the law need provide, particularly as this bill would go on to say that we need not stop for that extra information and should not postpone for purposes of that general study consideration of and action upon any plan proposed under this title? The short lines as well as the others have their counsel, and the short lines have the further benefit of having a strong organization with very able counsel, and that organization is accustomed to appear on behalf of the short lines. I can not feel that there will be any inadequacy in the presentation on behalf of short or weak lines of whatever may be their claims to recognition in a proposed unification if this provision as to a special duty of the commission to make and have available for its use a study is omitted.

Senator WAGNER. The data is to be available for you to pass upon the plan of unification, is it not?

Commissioner HALL. I understand so. We can not use it unless it is put in the record.

Senator WAGNER. If you do not postpone consideration of the unification you might make a perfectly useless examination, because it may come after you pass on the unification.

Commissioner HALL. Yes.

Senator WAGNER. If you are not required to do so and hesitate until you have completed your study.

Commissioner HALL. Yes.

Senator WAGNER. I agree with Senator Couzens that it is rather contradictory there.

Commissioner HALL. In order that I may, if possible, get through this text I am going to push on to some other things. Paragraph 4 on page 12 gives the commission the express power for good cause shown to make such orders supplemental to any order issued under this title as it may deem necessary or appropriate, but it limits that power to make such supplemental orders which appear in lines 13 to 15. I have bracketed them in my text and my suggestion is that the words I am about to read should be left out—"upon the petition of a carrier (or of its successor in interest) which, under the plan, acquires the property of another carrier." I do not see why we should not have good cause shown and make supplemental orders such as we deem necessary or appropriate, whether or not one carrier or another carrier had petitioned, or whether no carrier had petitioned.

You will observe further that this is confined to the petition of a carrier which under the plan acquires the property of another carrier; that is, a carrier that is operated under subdivision (a), which you will find on page 6. You will find that on page 6 it says:

> The plan may provide for one or more of the following:

And then follows the subparagraphs, (a) acquisition of the property of another carrier by purchase, sale, exchange, lease, or otherwise; paragraph (b) by corporate merger; paragraph (c) corporate consoli-

dation of the properties; and paragraph (d) through acquisition of securities, by purchase, exchange, lease, or otherwise.

The carriers here named on whose petition a supplemental order may be made are confined to carriers whose plan is based on subdivision (a) on page 6, and by inference excludes those whose plans have been based on subdivisions (b) or (c) or (d). I think that is an undue restriction and should not be retained. I think the commission should be authorized to make such supplemental orders as it may deem necessary or appropriate for good cause shown.

Senator FESS. Whether petitioned or not?

Commissioner HALL. Yes; whether petitioned or not. If the need develops, if it is something that should be rounded out, I think the commission should be expressly empowered to make a supplemental order.

Senator COUZENS. We can consider that later.

Commissioner HALL. Surely. I just touched upon it in passing.

Section 208 is an exceedingly important one. Our order will have been made after the hearing contemplated in section 206 and will cover what is provided in section 207, but it does not become effective until the board of directors and the holders of the stock of each of the carriers designated in that order consent thereto, or, in the case of a carrier which merely seeks to acquire the securities of another under these provisions, then the board of directors of that acquiring carrier consent thereto. Now, that consent is given in the form of a vote for the adoption of the plan as approved, and in order to give Federal authority for the taking of such a vote, either at a regular annual meeting or at a special meeting held pursuant to the State law and in the mode provided by a State law, there is here a provision that the vote may be taken even though it be for something which is prohibited by the laws of the State or the constitution of the State. It provides what shall be an effective vote for an adoption of the plan. It provides how those votes shall be cast. It deals with the number of the votes which any stockholder is entitled to cast.

I suggest the insertion at the end of line 20, on page 13, right after the word "being" the words "upon the question of the adoption of the plan as approved."

If this should be an annual meeting the number of votes that the stockholders are entitled to cast are determined by the laws of the State when it comes to the election of directors and these various other matters. Congress here is undertaking merely to say what number of votes a stockholder should be entitled to cast upon this question of the adoption of the plan as approved. This language which I have just suggested is not new. You will find it on page 14 in line 13. It would seem to be desirable that the same words should be inserted here at the end of line 20 on page 13.

Senator COUZENS. By putting in that language it would insure the stockholders knowing that the question is going to be voted on at an annual meeting?

Commissioner HALL. I presume that the notice of the annual meeting would show that.

Senator COUZENS. It does not always do that. They do not always put in all the subjects that are going to be discussed. I think your suggestion is very apropos there.

Commissioner HALL. I think it is a desirable insertion.

Mr. THOM. I may abbreviate it a little by saying that I think it is a very good suggestion.

Commissioner HALL. To save time I pass right along. All of these things are worthy of discussion, no doubt, but when I make no comment it is simply because I give full assent to what is here proposed. I assent thus to this new paragraph 5 in italics on page 15. It replaces the old paragraph 5. This new paragraph 5 is a provision of very great importance. I only want to call your attention to the words at the bottom of that page in lines 23 and 24, reading:

it being hereby declared that all such covenants and provisions to the extent that they tend to hinder or prevent any unification of carriers under the authority of this title are contrary to the public interest.

I call attention to that because I shall revert to that a little later.

Section 209 on page 16 as modified seems to call for no comment. You will observe, however, that the certification which the commission is to make will be based wholly upon the certificates which it receives from the several carriers.

I pass on to page 18, paragraph 3, which begins in line 23 on that page. I call your attention first to the word "any" in that line, "the entry of any order by the commission under this title and the certification by the commission under section 209 shall be conclusive evidence."

Any order would include such supplemental order as the commission would be authorized to make under a provision which I was discussing a few moments ago and as to which I suggested that power to make such supplemental order should not be confined to a petition by a carrier who acquired the property of another carrier. I referred to paragraph 4 on page 12, lines 12 to 17. It does not seem necessary if some order of the commission is to be given the effect of conclusive evidence that any order it makes should also be given the effect of conclusive evidence as to the same thing.

Mr. THOM. Would your objection be cured if those first two lines be made to read, "The entry of an order by this commission approving a plan"?

Commissioner HALL. Yes, I think that would take care of it. I will take up next this feature:

shall be conclusive evidence that the carriers designated in such order, and their boards of directors and stockholders have complied with the provisions of this title which are applicable to such carriers, boards of directors, and stockholders and which are conditions precedent to the entry of such order and such certification.

Without reverting to what has been said with regard to conditions precedent, but merely emphasizing that if there are in this bill conditions precedent, I think the commission is entitled to have it plainly indicated which are conditions precedent and which are not.

I want to touch now upon these words in line 25, "shall be conclusive evidence." Our orders are prima facie evidence under existing statutes, with one exception that occurs to me, and that is in the Clayton Act which was passed after I came on the commission. There has been no proceeding so far as I recall during my experience on the commission under section 11 of the Clayton Act. I am unable to indicate therefore what view a court would take, because no court has had a chance to take a view. In the Clayton Act it is the findings and not the order that is conclusive. On page 148

of the commission's print of the interstate commerce act and allied acts, in section 11 of the Clayton Act, appear these words:

> Findings of the commission or board as to the facts if supported by testimony shall be conslusive.

And again, beginning at the bottom of that same page, 148, of our print:

> And the findings of the commission or board as to the facts if supported by testimony shall in like manner be conclusive.

That means conclusive when brought into court under certain proceedings contemplated by the Clayton Act.

I would certainly question, Mr. Chairman, the wisdom of providing here that the commission's order should be conclusive evidence that the carriers have complied with the law, when, as I have noted on page 5 of this print, lines 10 to 14, inclusive, the unification of carriers or any of the railroad properties of carriers, directly or indirectly, after enactment of this act shall be unlawful unless such unification is in accordance with the provision of this title or with an order of the commission.

It seems to me that if contrary to the facts certified to us by the board of directors or the stockholders of the carriers, or contrary to our understanding of what had taken place, there had been a failure to comply with this act and that failure could be developed in a court, the court should not be debarred from considering and acting upon the evidence before it by the provision here that the carriers have complied with the provisions of this title.

Senator COUZENS. I think the commissioner is right on that question. What would he suggest as a substitute there?

Commissioner HALL. My first suggestion would be prima facie evidence, if you want to say what the evidence would be.

Senator COUZENS. I think the point is well taken and the substitute should be made.

Senator WAGNER. Suppose you enter an order, have you the right if subsequent information is brought to the attention of the commission that there was a misstatement of facts to modify your order?

Commissioner HALL. Under the provisions of Title I we have the power to reopen any of our proceedings and to make such orders as might modify existing orders or make such an order as the facts developed on the reopening might show to be appropriate, and as this will be a part of the same act but simply another title in the same act, I should assume, unless the courts ruled otherwise, that we had power her that we have there.

Senator WAGNER. Within what period of time?

Commissioner HALL. There is no limitation under the act. A court may be limited as to its reopening by the expiration of the term or of the expiration of the succeeding term, but under the act there is no limitation at all. In other words, as I read the act, if we choose to reopen a proceeding that was closed in 1910 we could do it right now.

Senator BLACK. Suppose that, after the consolidation has operated for 10 years, some individual stockholder finds that there was a mistake made. Should there be any method provided whereby there would be any definite period of time within which this contest would not be permitted? If you make it prima facie and do not give it the stability of a judgment, of course, I can see that there should be some method by which the mistake could be corrected; but should not that be by appeal?

Commissioner HALL. Would not such a lapse of time as that go strongly against the objection made? It seems to me that if the carriers come here and seek the approval of a plan and get it and then procure the consent and supply evidence of that consent by their board of directors or by their stockholders as may be appropriate under this bill——

Senator COUZENS. In any event, it is at the discretion of the commission whether it opens it up and they will be guided by the evidence.

Commissioner HALL. Yes; and then go ahead and effect unification, and that operates for 5 or 10 years.

Senator FESS. I suggest that we take that under consideration.

Mr. THOM. I was going to suggest, Mr. Chairman, in view of the expressions of Senator Couzens, that the committee withhold judgment on this subject until they can hear the reasons which have been suggested to us to ask that the wording of this bill be changed in that respect. We have some reasons which we would like to have you consider.

Senator FESS. We will make a note to consider that.

Senator WAGNER. Is there not a limit placed upon the time when your action may be reviewed by the courts? Must not proceedings be brought within a certain time? Is not there a statute of limitations?

Commissioner HALL. Well, if we make an order for the payment of money that has to be acted on inside of a year. Will you state that, Mr. Healy?

Mr. HEALY. If the carriers want to secure a review of the commission's order they must apply for an injunction before the order becomes effective.

Commissioner HALL. Was your question based on the assumption that a carrier who was a party to the proceeding might seek to establish that the law had not been complied with?

Senator WAGNER. Or some phase of the order. Suppose they wanted the review of a court. Well, Mr. Healy answered the question.

Commissioner HALL. Our experience has been that if they find any fault with the order they get into a court very quickly. They seek an injunction. Perhaps I did not get the full import of the question asked.

Senator BLACK. Since you said prima facie that left it open until there was some judicial determination.

Commissioner HALL. I shall be very glad, of course, to have Colonel Thom develop the reasons which led him to suggest that the entry of an order by us shall be conclusive evidence.

Mr. THOM. That is in the Fess bill. We did not suggest its change.

Senator BLACK. I do not like the idea myself of conclusive evidence.

Commissioner HALL. I suppose this bill should provide a limited time within which a limited assault on what was done in purported compliance of the act, but Colonel Thom will develop his reasons for standing by the words "conclusive evidence."

Section 211, which deals with the effect of a corporate consolidation and merger is a rewording in the interest of clarity, I think. If you will turn back to page 6, section 203, you will find that the words which I read in line 16, "a corporate merger or consolidation," are proposed to be divided into two paragraphs, (b) and (c), one dealing with a corporate merger and the other with a corporate consolidation; and following out that same idea there has been, as I understand, the substitution of the text which appears on pages 20 and 21, and to some extent on page 22, in italics in place of the text of the Fess bill now before you.

On page 22, in lines 3 to 5, appear the words "the rights of creditors and all liens upon the property of any of the constituents or merging corporations shall be preserved unimpaired."

That should be read in connection with the words to which I referred at the bottom of page 15, lines 23 and 24, "it being hereby declared that all such covenants and provisions to the extent that they tend to hinder or prevent any unification of carriers under the authority of this title are contrary to the public interest."

It would seem that the rights of a creditor or holder of bonds secured by mortgage or deed of trust which contained various provisions for the benefit or security of that creditor were rights. Under this wording on page 22, lines 4 and 5, those rights would be preserved unimpaired, but under the wording in lines 23 and 24, on page 15 and following, "such covenants and provisions to the extent that they tend to hinder or prevent any unification" are contrary to the public interest, and therefore ineffective. Now, there is a little conflict there which perhaps can be readily cleared up by a change in the wording.

Mr. THOM. Would not your idea there be expressed by inserting after the word "creditors," in line 3, on page 22, the words "except as provided in paragraph 5 of section 208"?

Commissioner HALL. That would seem to take care of it. Section 212, as appearing in the Fess bill, is replaced in this print by a section 212 in italics. The section 212 in the Fess bill and this substitute which is now proposed in italics are both the outcome of long consideration, and reflect some suggestions that have been made by the commission. I think Colonel Thom will recall them. On the whole they seem to me a reasonable and sufficient provision for taking care of the dissenting stockholder. I do not know that I need to comment upon them now except in respect of paragraph 3 of section 212 which appears on page 25. Beginning in line 12 that paragraph reads:

> The opportunity to be heard by the commission and the right to secure just compensation for their stock, as afforded by this title, shall constitute the sole and exclusive remedies, in opposition to the plan, of stockholders of a carrier owning or possessing railroad or terminal property, all or the greater part of which would be acquired by another carrier or of another carrier which would be merged into or consolidated with another carrier pursuant to a plan providing for a method of unification under subdivision (a), (b), or (c) of paragraph (2) of section 203.

Now, if the emphasis in that paragraph is to be placed on the words in line 15 "in opposition to the plan" and means in essence that while the remedies of one stockholder against his directors or his trustees or other stockholders is based on grounds of fraud or use

of trust or otherwise his individual remedies remain unimpaired, then the objection which I am about to voice dwindles or disappears, because that would mean that in so far as stopping the going into effect of the plan is concerned the opportunities here afforded in the opinion of the Congress will suffice, leaving to any individual who feels himself wronged the recourse which the courts of this country afford. But if it means that this opportunity to be heard by the commission and the right to secure just compensation for their stock which is confined in the preceding provisions to the case of registered stockholders, those who were stockholders before the plan was presented to the commission and continued to be stockholders down to and including the time when the vote was taken by the respective carriers in approval for adoption of that plan, then it seems to me this is very drastic language indeed. I do not know but I have assumed that the meaning of this paragraph properly construed is that in so far as these grievances which may exist were to be presented are concerned they shall not suffer to stop the train, but the unification shall proceed. If that is the intent I do not know that I have any objection to it, except that that be made very plain; but if it is the intent that the commission, which has no equity powers, no powers to deal with fraud, no powers to deal with the other grounds which might be urged as constituting a grievance against an individual stockholder—if it be urged that the opportunity to be heard by us is exclusive of recourse to the courts, I am not prepared to go with it, Mr. Chairman. I do not think the commission would ask to be accorded any such power.

The CHAIRMAN. Is that what that means, Colonel Thom?

Mr. THOM. I am not the author of that, Mr. Chairman, and, therefore, I would like before answering the question to get the views of the people who are the authors of it.

The CHAIRMAN. Very well.

Senator FESS. Have you any suggestion, Commissioner Hall, for a change of language there?

Commissioner HALL. I have not framed it, but, as I say, if it means that it shall constitute the sole remedies in opposition to the plan; that is, the only thing that can stop the plan from going through, some form of words can certainly be found which will express that idea.

The CHAIRMAN. Do you think there should be the right of appeal to the court as to whether of not a plan is a feasible one. Ought not the decision of the commission be conclusive on that proposition?

Commissioner HALL. Senator, not by statute but by the interpretation placed upon the statute by the court. The finding of an ultimate fact by the commission such as that a rate is reasonable or unreasonable, that it is unduly prejudicial or not, is, in effect, a final finding, because the courts will not undertake to go into that further than to determine whether the commission has acted arbitrarily and without evidence or whether the result of what it does is confiscation.

The CHAIRMAN. The hour of 12 o'clock having arrived, I imagine we will want to take a recess. I am compelled to leave the city to-night and shall not be back until Monday morning. It is the first time that I will have absented myself from Congress for so

long a time since I became a Senator, but I can not avoid it. The exigencies of Indiana politics are such that my presence there is needed. We have our program somewhat cluttered up. We started out with the Esch nomination and had to drop that and then took up the radio matter and had to drop that, and evidently we will have to drop this because we can not complete it before Saturday night. However, we will go on with this hearing and in my absence Senator Couzens will preside. I suggest that Senator Fess, the author of the bill, shall have charge of the program. I am assuming that you will return to-morrow morning, Mr. Commissioner?

Commissioner HALL. Mr. Chairman, I was going to say that I really have covered about all I have to say except in this general way, that all things considered, this print that we have been discussing here represents not only the latest but the best intent to correct the existing statute that I know of, and, while I have touched upon things here or there, it was only in the sense in which one who heartily approves in the main would touch upon small points that need correction. There is the old saying that it is bright sunlight when the grass casts a shadow. All I have been touching upon is the grass.

The CHAIRMAN. Have the members of the commission generally considered this bill as now introduced?

Commissioner HALL. They have not had an opportunity, Mr. Chairman.

The CHAIRMAN. We will adjourn now until 10 o'clock to-morrow morning.

(Thereupon, at 12 o'clock noon, the committee adjourned until 10 o'clock a. m., Wednesday, January 11, 1928.)

CONSOLIDATION OF RAILWAY PROPERTIES

WEDNESDAY, JANUARY 11, 1928

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjornment, at 10 o'clock a. m., in the committee room, Capitol, Hon. James Couzens presiding.

Present: Senators Couzens, Fess, Pine, Sackett, Wheeler, Black, and Wagner.

Also present: Senator Brookhart of Iowa.

Senator COUZENS (presiding). The committee will please come to order.

Senator FESS. Mr. Chairman, the idea was to have the commission represented before the committee and Commissioner Hall was here, as you know, for two days. While he did not complete his statement, he said substantially that it was completed and the commission is busy and, therefore, he ended his hearing yesterday, and if it is agreeable we will have Colonel Thom to-day.

Senator COUZENS. That is agreeable, but the thought occurred to me that possibly there are other witnesses here who would like to be heard promptly in order that they may get away. You do not know of any, Senator Fess?

Senator FESS. I do not know of any. I understand that witnesses are coming who would like to be heard as soon as they get here.

Senator COUZENS. Inasmuch as Colonel Thom is a resident of Washington, I thought these outsiders should be given an opportunity to be heard and get away if they desire.

Senator FESS. After Colonel Thom gets through I think we can throw the matter open to any one who wants to come in.

Senator SACKETT. Colonel Thom went over this last year and his statement is in the record, is it not?

Senator FESS. Not with respect to the changes. There are some changes that have been made by the law committee of the Association of Railway Executives in perfecting this text.

Senator SACKETT. Is it necessary to go into the whole business again? There are no new members on the committee here.

Senator FESS. There will be, though. There are several members who have not been on the committee that will be here, I think.

Senator COUZENS. Is it your idea that Colonel Thom should start at the beginning of the bill and go through, or that he shall just point out certain things that he desires to comment on?

Senator FESS. I think he should be permitted to go through in line with the questions of the committee.

Senator COUZENS. Colonel Thom, will you proceed now?

STATEMENT OF ALFRED P. THOM, GENERAL COUNSEL, ASSOCIATION OF RAILWAY EXECUTIVES, WASHINGTON, D. C.

Mr. THOM. Mr. Chairman and gentlemen, the existing Federal law in respect to consolidations is found in section 5 of the present interstate commerce act, beginning with paragraph 2 of that section. The scheme of that law was, as I was told by its author, to provide a general plan for consolidations, and while that matter was being made practicable by a plan from the commission for universal consolidation there should be an adinterim method adopted which would enable a carrier to obtain control of another carrier if approved by the commission in any way not amounting to a consolidation. That plan was adopted under conditions which indicate that the ploicy of Congress then declared was in no sense a partisan policy.

The plan for consolidation as it exists in the law was the outcome of the work of a subcommittee of this committee, consisting of Senator Cummins, Senator Kellogg, and Senator Poindexter, Republicans; and Senator Robinson and Senator Pomerene, Democrats. It was approved by a Democratic President. This plan as it exists in the present law has been found by universal concession an impracticable method of accomplishing the purpose of Congress.

Senator COUZENS. At that point would it interrupt you if you point out what the impracticable features were?

Mr. THOM. I will come to that in one moment, Senator, if that is satisfactory.

Senator COUZENS. Yes. I do not want to interrupt the continuity of your speech, but I would like to have these things related if possible.

Mr. THOM. I am making no speech, Senator; I am just trying to give a picture of the situation.

Senator FESS. That is precisely what I wanted, the members of the committee to interrupt by inquiries so as to bring out all questions of either doubt or lack of clearness.

Senator COUZENS. That is the reason I thought it would be proper to put in the objections to the law at the point where he said there were objections.

Mr. THOM. I am coming to that, Senator. I merely want to say, in advance of that, that beginning in 1922, and in every annual report to Congress since, the commission has pointed out that the present plan is not a practicable plan and asked for its amendment. The President of the United States has in every message since the present incumbent of the office entered upon his duties recommended to Congress that there should be an amendment to the law so as to make it workable.

In respect to the question of whether or not it is workable, it may be useful for me to give you a résumé of the testimony of the Interstate Commerce Commission on that subject. Commissioner Hall presented objections here, although not quite as fully as he did in the hearings before the House Committee on Interstate and Foreign Commerce, and those hearings have been printed. Without going fully into them, I will point out that you will find these objections as made by the commission on page 28 of the printed report of the first part of the hearings before the Committee on Interstate and Foreign Commerce of the House, which hearings were held in December. I will give a brief résumé of what those objections are.

Senator COUZENS. Do the railroads, equally with the Interstate Commerce Commission, want those objections removed?

Mr. THOM. Yes; they are in agreement that this is an impracticable method. Bearing on this subject which you have just introduced I should perhaps state that this idea of the consolidation of State corporations did not originate with the railroads. Their proposal was, when the transportation act was under consideration, that all roads engaged in interstate commerce should be made Federal corporations, and among the powers contained in the Federal code of incorporation which was presented by them was the power of merger or consolidation along with a great many other powers conferred by an act upon the Federal corporation; but this idea of a consolidation or merger or unification of State corporations did not originate with the railroad. However, in view of the adoption of that policy by Congress in the transportation act their attention has been directed to that as a policy of the country, and many of them have greatly changed their situation because of that policy being the policy of Congress.

They have looked forward to the association—some railroads have looked forward to the association—of another railroad with it, and have been acquiring its securities. Another railroad has been looking around to see what its competitors were doing in the direction of consolidation, and it has been trying to find out what it could do to meet that competitive situation. So that in view of the policy of Congress in respect of consolidations being thus emphatically announced as the action of both parties and approved, as it has been, there has been a change in the outlook of the railroads in respect of their future, and, as a consequence, they became more interested in the question from a practical standpoint than they would originally have been.

As to the objections to what Congress did, I can give you a brief summary of those objections as they appear to the Interstate Commerce Commission and I will say that I regard what the commission finds as objections as sound. As I say, the present law provides for what the author of this consolidation method, Senator Cummins, advocated, creating an ad interim method of dealing with small situations, as he thought, that must be dealt with before the proclamation of a plan for a complete consolidation, and then after that that there should be a division of the country in its entirety into railroad groups which should be followed in the consolidation plan.

Mr. Hall has testified that there are several objections to that plan. In the first place, he has stated that in the consolidation part of that article the only method provided for is a consolidation of properties where the owner operates the acquired property and where also the operator owns the acquired property. The ordinary method of acquiring by lease or of acquiring by control of securities covered by paragraph 2 of section 5, which the author regarded as an ad interim method, would reduce the power of consolidation under the act to the consolidation as it is defined to be technically in the law. That is to say, where one railroad acquires and owns and operates all the properties that are consolidated.

Mr. Hall has told you that that is the most unusual method historically that has been adopted for bringing these railroads

together, and the usual methods are not provided for at all unless they are provided for in paragraph 2 of section 5.

Senator COUZENS. You do not believe they are provided for, then, in paragraph 2 of section 5?

Mr. THOM. I do not believe they are adequately provided for.

Senator SACKETT. Do you mean properties limited to owned and operated or owned or operated?

Mr. THOM. Owned and operated.

Senator COUZENS. I suppose at some place in your testimony you will point out the advantages of consolidation by means of the acquiring of stock?

Mr. THOM. Yes; I will try to do that, Senator.

Senator COUZENS. Frankly, I do not see the advantages of consolidation unless there is unity of operation. I do not know whether the railroads and the commission have a different viewpoint or not.

Mr. THOM. Answering Senator Sackett's inquiry, paragraph 6 of section 5 is as follows:

> It shall be lawful for two or more carriers to buy railroads subject to this act to consolidate their properties, or any part thereof, into one for the ownership, management and operation of the properties theretofore in separate ownership, management and operation under the following conditions.

So that Mr. Hall's first objection was that the only method of true consolidation under the existing law is the one least used historically of any to bring about a consolidation of railroads.

Senator PINE. Is unification a term there you could use with your theory of the case?

Mr. THOM. I think so. That is a generic name that should be used, unification.

Senator PINE. Do you propose to unify them completely?

Mr. THOM. Well, to the extent that is set out in this act.

Senator FESS. Senator Pine's idea of unification would be on the one system.

Senator PINE. And as he described it, as I understood it, he does not want to put all the railroad units into one unit.

Mr. THOM. Oh, yes; I expect that will be done as to groups, but there are various methods of bringing that about.

Senator PINE. Not if it is a single unit?

Mr. THOM. Yes; I think so. That is at least the purpose and the expectation, that when there is unification there will remain a single unit. The methods of bringing them together may be different.

Senator PINE. There will be several corporations, will there not?

Mr. THOM. Only one operating corporation.

Senator PINE. It will be a unification, as far as operation is concerned; but not a unification as far as ownership is concerned?

Mr. THOM. It should be both. It is provided in this present proposal that there shall be a method of absolutely unifying the properties into a consolidation, or by merger into a unification, or there may be an acquisition by one carrier of properties of another or others under other methods of acquisition, although the result is one company operating all the properties brought into the unification.

Senator PINE. It occurs to me that if there is a complete unification there must be one individual or corporation owned, controlled, and operated. That would be a unification, as I understand the term.

Mr. THOM. Well, I suppose that would be one form of unification, Senator; but I suppose there are others. For example, if roads A and B merged their properties into one, leaving only A, and then there was a road C which A would lease and would have the authority to operate, that would be a unification; although not accompanied by complete ownership.

Senator FESS. I think, Colonel Thom, what Senator Pine had in mind was that we propose here unification; that being the general term it may be by merger; it may be by consolidation, and it may be by the purchase of securities or otherwise. So they would all be unifications but of a different type, and what I got from Senator Pine was that the term "unification" is not a happy choice of a term.

Senator PINE. I note that the bill uses the term "unification," and in discussing it practically everybody talks about consolidation.

Mr. THOM. I believe consolidation is the least important word in connection with the whole business, Senator, as I shall try to show you. I think unification is probably the only general term which covers the various processes by which these railroads may be brought together and operated as one in a group or in a system.

The second objection made by Mr. Hall which I will mention is that the present law requires the commission to make a plan covering all the railroads of the country, and after an effort extending from 1920 to 1928 they have found that an impossibility. I will add to that suggestion of his that even if they could accomplish that purpose the result would be to attempt to impose from above a plan of grouping these railroads, which, in practice, would be found utterly impracticable, instead of allowing that to be developed in an ordinary businesslike way through the voluntary action of the railroads themselves. In support of that I would like to read to the committee a statement made by Chairman Eastman to the Congress in respect to that aspect of the matter. When he appeared before this committee on January 2, 1926, he said, speaking of the possibility of this general plan:

> The practical experience which we have gained in attempting to formulate a plan, however, leads us to doubt the utility and indeed the wisdom of this provision of the law. A majority of the commission has, therefore, held the belief, as we stated in our communication of last February to Senator Smith, that results as good, or perhaps better, were likely to be accomplished if the process of consolidation is permitted to develop under the guidance of the commission in a more normal way.

That more normal way is understood to be the railroads getting together in a group and making their financial arrangements for the unification of their properties, providing the means to carry that into effect, and bringing it to the commission for consideration and approval; or for modification by the commission if a modification be deemed in the public interest.

Senator WHEELER. Do I understand that you are opposing this consolidation bill, Mr. Thom?

Mr. THOM. No; Senator.

Senator WHEELER. I did not think so.

Mr. THOM. I suppose there is some humor in your question, in view of the fact that you have heard me so often on this subject. I am talking about the objections in response to an inquiry by Senator Couzens.

Senator WHEELER. May I ask you a question? Would you have any objection to a provision in there providing that the railroads should not be permitted to issue nonpar stock?

Mr. THOM. That is a question which I think I would have to refer to those who have the financial management of the railroads. The value of nonpar stock is considered to be substantial by some people, and I am not advised as to what the views of the railroads are.

Senator WHEELER. I notice that the Milwaukee Railroad was permitted to reorganize with nonpar stock. I am going to say to you right now that so far as I am concerned I am going to try to put a provision in providing that there shall be no more consolidations or reorganizations where they have nonpar stock in there.

Mr. THOM. Resuming the answer to Senator Couzens's question, I would say that the second objection to this present law to which I have alluded as made by the commission, and I believe justly made by the commission, is that it is absolutely impracticable for the commission to make a plan of all the railroads in the country, and if they did it would amount to nothing, because it would require the cooperation of the railroads to carry it into effect, and the effort of the railroads to bring about unification can best be advanced by allowing them to originate a plan, to bring it before the commission, and, if it is in the public interest, have it approved and carried out.

Mr. Hall, in the third place, suggested that this requirement that all the railroads in the country should be assigned to a definite plan is too rigid. The result of it has been that while in the early period of the law there were three applications made to the commission for consolidation under it, the commission found itself unable to grant them because it had not agreed upon and promulgated a plan, and that since then there had been none and everything has been brought to a standstill.

The fourth objection that Mr. Hall made was that the existing law requires a valuation of the railroads before there can be a consolidation, and that, likewise, if consolidation is in the public interest and should take place, it is merely an obstacle in the way of consolidation and not a help for the reasons, as he stated, that after 14 years under this requirement that the railroads should be valued, neither the commission nor the public are as yet advised as to what kind of a valuation is required and as to the rules which should be adopted in making it. And if consolidations are in the public interest and should be made, to require them to wait for valuation would be simply to abandon the whole plan.

Senator COUZENS. Most of that objection has now been overcome, however, has it not?

Mr. THOM. No; none of it has been overcome.

Senator COUZENS. Have not most of the roads been valued?

Mr. THOM. No; none of them have been valued in a way that the courts have approved. All of that work has got to be litigated now.

Senator WHEELER. Some of them have been valued, have they not?

Mr. THOM. They have been valued by the commission, but none in a way that the courts have approved, and that is in litigation.

Then there was another point which Mr. Hall regarded as of cardinal importance, and which I likewise regard as of very great importance, and that is that the present law does not undertake, according to the conceptions of a great many people and by the admission of all in

respect to consolidation itself—it does not undertake to confer the power, the requisite corporate power, upon the companies that ought in the opinion of Congress and of the commission to consolidate to carry the consolidation into effect. We might have, for example, a railroad running in one State where the State laws permitted it to consolidate with another. It may want to, and the commission might think it desirable for it to consolidate with a railroad running into another State the laws of which do not permit it. Now, if this consolidation is to be made effective, the corporations must have a corporate power to do what Congress thinks in the public interest they ought to do.

I shall attempt to hurry on, and in view of what Senator Sackett has very properly said that a number of times this matter has been discussed before this committee, not to make any undue repetitions.

To provide for the defects in the present law, reiterated by the commission since 1922 and impressed upon Congress in every annual message of the President since 1923, including the last one, a bill has been prepared and is presented for consideration.

Mr. Parker, the chairman of the House committee, at the beginning of the session before the present one introduced a bill for the consideration of the House. Senator Fess introduced a similar bill for the consideration of the Senate. Hearings were had before both committees. The committee of the Senate took no action at the last session. After elaborate hearings the House committee took the matter up and considered it for at least a month in executive session; and during that month they went through most of the bill and arrived at certain tentative conclusions which were embodied in a bill introduced in the House on the 3d of last March by Representative Parker with an address on his part asking that that bill be made the basis of consideration during the recess of Congress and that all having an interest in the matter and being desirous of being heard should be able at this session to bring forward their criticisms of that measure.

There having been no expressions from this committee, and in view of that invitation from the House of Representatives practically, or from the House committee, the law committee of the Association of Railway Executives at once undertook a study of the latest Parker bill, the one introduced on the 3d of last March, and appointed a committee, called a drafting committee, to consider the terms of that bill.

That drafting committee consisted of Judge Lovett, of the Union Pacific, with whom Mr. Clark, the general counsel for the Union Pacific, acted; Mr. Cary, general counsel of the New York Central, in whose absence for a couple of months during the summer Mr. A. H. Harris, a vice president of that company, acted; Mr. Bledsoe, who is now in the room, general counsel of the Atchison; Mr. Blair, general counsel of the Southern Pacific, and myself. We had a great many meetings. We were permitted by the chairman of the House committee to confer with the draftsmen of the House in respect to any question of draftsmanship, not in regard to any questions of policy, realizing, of course, that all questions of policy must be determined by Congress itself. But if we had a suggestion to make, and in order to relieve any question about the method of its expression, if our suggestion should be approved, we were allowed to confer with the draftsmen of the House of Representatives.

Those draftsmen were Mr. Alvord, Mr. Wood, and Major Dowling, professor of law at Columbia University, in charge of the drafting department of that university, who was brought down here to help on general questions of drafting.

Senator WHEELER. So you really did not draft this bill?

Mr. THOM. A great deal of it we did not. Those gentlemen when a suggestion was brought forward were requested to see how the suggestion fitted in with the general draftsmanship of the Parker bill as introduced in the House, and to suggest a method of expression. At last the drafting committee came to a conclusion as to the suggestions that we would make. These suggestions were then printed—I am speaking now of the suggestions of the drafting committee—and the National Industrial Traffic League, which represented the shippers, was furnished with a copy of it, members of the Interstate Commerce Commission were furnished with a copy of it, the American Short Line Railways were furnished with a copy of it, and anybody else that wanted one was given a copy.

Finally, on November 15——

Senator WHEELER. Everybody was represented excepting the general public.

Mr. THOM. Do you not consider the National Industrial Traffic League as representing the general public?

Senator WHEELER. I would not say that they do by a long way.

Mr. THOM. I do not know; but anybody that wanted them was furnished copies. In addition, the United States Chamber of Commerce were furnished copies. Then that report of the drafting committee was sent to the law committee of the Association of Railway Executives on November 15, when we had a meeting to consider the suggestions made by the drafting committee. The law committee consists of between 35 and 40 of the general counsel of the principal railroads of the country. Those amendments proposed by the drafting committee were gone over and some modifications, more in verbiage than anything else, were made. Then that was printed and circulated just as I have described as having been done with the report of the drafting committee. The suggestions made by the law committee have been presented to this committee and a copy is before you.

Senator SACKETT. Is this the same bill that is at present pending in the House?

Senator FESS. It is virtually the same.

Mr. THOM. There are some modifications. The bill as presented here in our suggestion is exactly the one that we are making to the House. Of course, we struck out different things in the Fess bill from what we have struck out in the Parker bill, because they differ in certain respects. This bill of the 3d of March of Mr. Parker differs somewhat from the Fess bill as introduced last year and which has been reintroduced this year. So in making suggestions about amendments we have struck out different things. But the result is that we are bringing here to you exactly the same bill as is now under consideration at our request before the House committee.

The bill may be described as divided into a number of parts; first, the definitions which indicate the limits within which, if the bill is passed, Congress will undertake to take affirmative action. Next is a presentation, first, as we suggested, of a policy; but that was not found acceptable by the House committee as they did not want to declare a policy.

Then, there is a statement of how the proposed unification shall be initiated, the steps that shall be taken prior to bringing it to the attention of the commission, and then what shall be required before the commission in passing on it.

It briefly declares that any group of railroads may get together and agree upon a unification in a way described in the bill, and that having reached such an agreement, that they must then bring their plan to the Interstate Commerce Commission by petition and the Interstate Commerce Commission shall have power when that is brought before them, to consider the whole subject and to find out what is required in respect to it by the public interest. They may either approve the application as presented; they may deny it as presented; or they may approve it with such modifications or on such conditions as they may find to be in the public interest.

Senator BROOKHART. I would like to ask Colonel Thom a question, Mr. Chairman. I am not on the committee, but I am very much interested in this proposition.

Senator COUZENS. All right.

Senator BROOKHART. In reference to this policy as outlined here we are in this situation in the United States now: We are in certain competition with the Canadian Railway systems and they have two systems, a government-owned system and a private-owned system, but both of them extending from coast to coast. In that way they are able to give agriculture in the western part of Canada a very much better proposition on rates than agriculture is getting from the railways of the United States. Is there any suggestion in this bill in any way that these consolidations, unified systems, shall extend from coast to coast so as to properly compete with the Canadian principles?

Mr. THOM. There is no requirement that they shall extend from coast to coast. The commission is empowered under the bill to pass on that, among other questions.

Senator BROOKHART. But the commission could consolidate them by groups or regions in any part of the United States?

Mr. THOM. It could without requiring them to run from coast to coast.

Senator FESS. But it could permit them to run from coast to coast?

Mr. THOM. Yes.

Senator BROOKHART. The other proposition is that Federal corporations seem to be prohibited by this law. Is there any new rule established in reference to the valuation of railroads different from the laws that now exist?

Mr. THOM. No; none at all.

Senator WHEELER. Does anybody know now what the law is on the question of valuations?

Senator BROOKHART. No; they do not. It would be possible to enact some law that would end all this nightmare of valuation, would it not? For instance, it would be possible to stop the capitalizations in these new corporations.

Mr. THOM. Well, that raises a constitutional question of considerable magnitude with respect to the taking of property; but

there is nothing whatever in this law with respect to valuation and nothing in respect to Federal incorporation, and the reason that there is nothing in respect to Federal corporations is because the State commissions so strenuously objected to it.

Senator BROOKHART. I understand that, but yesterday you said there was power in the Congress to consolidate these railroads by condemnation if they choose to adopt that policy.

Mr. THOM. I did not quite say that, Senator. What I said was that there was power in Congress to permit one railroad to condemn another, not to require one railroad to.

Senator BROOKHART. The same power could be extended to a Federal corporation that would be organized for the purpose of consolidating railroads, could it not?

Mr. THOM. Undoubtedly.

Senator BROOKHART. I believe that is all for the present, Mr. Chairman.

Mr. THOM. When these questions were asked I was attempting to give a general description of the scope of the bill, and I had gotten to that provision where the applicants for a consolidation were permitted to bring their proposal to the Interstate Commerce Commission for its approval, or for its disapproval, or for its modification.

After the Interstate Commerce Commission has acted on such a proposal, the bill provides that that order shall not become effective until each one of the railroads involved, by a vote of its stockholders and by a vote of its directors, consents to the order. When that consent is given, the bill proceeds to create the machinery by which the order of the commission shall be carried into effect, and that is done with very scrupulous care to see that it is adequate to accomplish the purpose which would have then been declared to be in the public interest.

Finally, it is, of course, a possibility that all the stockholders of one of these carriers to be acquired may not be willing to go along with the proposal, and will become under the definition of the bill dissenting stockholders.

The bill thereupon proceeds to provide for the protection of the rights of those dissenting stockholders in one of two ways. One is, if they are willing to sell their stock by requiring the company that takes in the others to buy, if they can agree upon a price, and if they can not agree upon a price, or if the owner is unwilling to sell, then providing for the condemnation of this stock.

Senator WHEELER. Where is the condemnation suit to be started?

Mr. THOM. It may be in the district court for a judicial district in any State within which the carrier which issued the stock is chartered.

Senator WHEELER. I do not think that is fair at all to the stockholder, Colonel Thom. You put the stockholder to a great disadvantage. Take a stockholder in the Milwaukee or the Northern Pacific who lives in Montana. He may have but a small amount of stock and you bring him to Chicago or clear to the coast and it may cost him a great deal more than his stock is worth. I think you should compel the suit to be brought in the district where the defendant lives.

Mr. THOM. He may be a defendant or he may be a plaintiff.

Senator WHEELER. But it should be in the place where he lives.

Mr. THOM. But the place where the suit can be brought is in some judicial district in which the railroad is chartered. In a case

as large as this, it is desirable, and, in fact, essential, and the bill so provides, that all the dissenting stockholders may be joined in a single suit.

Senator WHEELER. He would have to go anywhere where he could get service upon the railroads?

Mr. THOM. Yes. That would be to make an impediment in favor of a dissenting stockholder in the way of the policy of Congress which was considered in the public interest.

Senator WHEELER. Here is a great railroad company and over here is a dissenting stockholder. You bring this dissenting stockholder from Montana to the city of Chicago, say, and he is subjected to that expense and also to the expense of hiring a lawyer. You are going to take every dollar away from him; you are going to confiscate his stock by so doing. I can not conceive of its being fair to a small stockholder. Of course, if it is a big stockholder that is a different thing; but you have got to draft this bill with a view to protecting the stockholder, if you have any.

Mr. THOM. Senator, the way this bill would necessarily work out would be that if condemnation were resorted to it would embrace in a single suit all the dissenting stockholders.

Senator WHEELER. Yes; but supposing there were not very many; supposing there were only a few.

Mr. THOM. It would embrace all of them, whether large in number or small in number; and the way that those dissenting stockholders would probably proceed would be to act together in respect to the matter, and, therefore, the expense and the difficulty to which you allude would be very much minimized.

Senator WHEELER. Supposing you have just a few stockholders. I have seen it happen numerous times; I mean in the consolidating of mining companies in my own state, for instance. I have seen those dissenting stockholders, just a few of them, for instance. They are not satisfied. They should have the right to go into court, and they ought not to be dragged clear across the country and compelled to spend every cent they have in expenses of that kind.

Mr. THOM. Senator, so far as that is concerned, you will, of course, appreciate that this is not a cardinal part of the bill.

Senator WHEELER. But it is an important part of it.

Mr. THOM. Whatever is considered to be the proper thing by Congress would have to be accepted. Your views may be entirely correct. That is not the view presented here, and if the committee and the Congress think it should be different, let us change it.

Senator FESS. I would suggest that we make a note of that. That is on page 26, beginning with the first line and running down to the seventh line. We will make a note of it and frame an amendment such as you have in mind, Senator Wheeler, to be considered when we go into executive session.

Senator WHEELER. I just wanted to call your attention to that, Colonel.

Mr. THOM. I am telling you exactly what is in the bill and you gentlemen must determine what should be in the bill.

Senator WHEELER. I appreciate that.

Mr. THOM. And I am giving you reasons why I do not expect any very great hardship. I may be mistaken about that. Of course, you gentlemen are the judges of whether or not I am wrong about it.

In connection with this question, Mr. Chairman, of condemnation, it is proper to remember that this method of condemnation must necessarily differ from the general method of condemnation. If an existing railroad or a public utility or a city or a State undertakes the condemnation of property, after there is a report of the amount which is awarded as just compensation, the applicant can abandon the proceeding of condemnation. It can see the price before it determines whether or not it will pay it.

Senator WHEELER. You say in the present State laws?

Mr. THOM. I mean that any State, any city, can go now to condemn property and they are not bound by the result until the award is in and they know what it amounts to, and they can then abandon the proceeding. It would be impracticable to have such a provision in this law, for the reason that prior to the condemnation the consolidation or the unification may have been accomplished, and there must be an absolute obligation on the condemning party here to take the stock that is to be condemned at whatever price is awarded for it. The only safeguard to that provided in the bill is that, in the first place, the Interstate Commerce Commission that has been dealing with these railroads knows their values, if anybody will accept their views of what values are, but, at any rate, it is one of the governmental authorities empowered to consider and determine that question, and they are made the board of appraisers to determine what is a just compensation for the stock, then their report is passed up to the court as a report of a master in chancery, and you have the double finding of the Interstate Commerce Commission and of the court, but after that double finding the applicant for condemnation must take the stock and must pay the price that is approved. They can not abandon the proposal.

Senator COUZENS. And the other party must also accept the award?

Mr. THOM. And the other party must accept it, yes. He must do it in either case. But in this case there is no change made in this respect, but there is a change made in the obligation on the part of the condemning applicant to take the property, no matter what the price.

Senator WHEELER. Have you ever looked into the question of a railroad going in and condemning stock?

Mr. THOM. Yes; it has been decided by the Supreme Court. Now, there remains merely one part of the bill to call your attention to before I take up the specific provisions of it, and that is, that instead of this bill being a compulsory bill or an effort at compulsion, it is made a permissive bill for a given period of years—seven years. If Congress passes this bill it will take the view that during those seven years there will be developed what can be accomplished under a permissive system. A shorter time would hardly be possible because a part of it may be taken up in litigating questions which interested parties may desire to have determined by the courts.

Senator WHEELER. What was the time provided in the old bill before Congress? Was it five years?

Mr. THOM. This bill was always seven years. Mr. Cummins's bill, I think, provided for five years. At the end of that period the Interstate Commerce Commission is required to review what has been done and report to Congress with such recommendations as they may think the situation calls for as it has been developed. In

other words, there is no effort in this bill to legislate now for a situation that will only be known a given number of years in the future. But Congress would undertake then to legislate in respect to a known situation and not in respect to an unknown situation.

Senator WHEELER. All this bill does is to permit the railroads that want to consolidate to go into a consolidation.

Mr. THOM. If their consolidation is approved by the commission as in the public interest; yes.

With that outline of the bill, I would like to take the bill itself and refer to some of the suggestions for amendments which have been made by the Law Committee. Mr. Hall has called attention to the fact that the old bill had as a caption to Title I "Regulation of carriers."

Senator SACKETT. Do you refer to the Fess bill of last year as the old bill?

Mr. THOM. Yes, sir.

Senator WAGNER. May I interrupt, Mr. Chairman, before Colonel Thom goes into the details of this legislation? There is a representative here from the Port Authority of New York. That is a public corporation, as you know, consisting of a compact between New Jersey and New York, and that port authority would like to be heard here on the question of terminals. I just wanted to inquire of the chairman if he could fix some time when these gentlemen may be heard upon this proposed legislation.

Senator COUZENS. Are they here now?

Senator WAGNER. The actual speaker is not here.

Senator COUZENS. May I suggest that if it is agreeable to the committee we hear him the first thing to-morrow morning? How would that do, Mr. Fess?

Senator FESS. If it is agreeable to Colonel Thom.

Mr. THOM. I will give way to him.

Senator SACKETT. We can arrange to have Colonel Thom's statement printed as a continuous statement, even if it is interrupted by another speaker.

Senator FESS. I do not want to have various topics interjected here until we get the law committee's view. I would like to have that uninterrupted and then we can hear those who desire to be heard on various items. The short line people want to be heard. The Industrial League desires to be heard. All of these have had a part in the framing of the bill. Then I would like to have every person who desires to be heard pro or con be given a free field, and as soon as Colonel Thom completes his statement it will be open. I assume, Colonel Thom, that you will not complete your statement to-day.

Mr. THOM. I may not. I can not tell. But you need not regard my convenience, so far as that is concerned.

Senator FESS. No; it is not just a question of your convenience. I understand that you can come at any time. The question was the breaking up of the continuity of the consideration.

Senator WAGNER. I do not want to press my claim at any particular moment. I think this port authority will come at any time that we can give some idea as to when he may be heard.

Senator FESS. I would suggest, then, the day after to-morrow.

Senator COUZENS. Suppose we hear him, then, at 10.30 on Friday morning.

Senator WAGNER. Thank you very much, Mr. Chairman.

Senator FESS. Mr. Chairman, Senator Hawes indicated to me that Mr. Williams would get here Friday and wanted to be heard. It has been suggested that when Mr. Williams gets here he should go on. Of course, we do not want any confusion. If the port authority will not want more than 30 minutes I think that will be all right anyway. Then we will leave it that way, that when Mr. Williams gets here he will be put on and we will hear the port authority first.

Mr. THOM. Perhaps I should say, Mr. Chairman, in further response to a question asked by you at the beginning of this session as to the difficulties in the old law and the objections to it, that there was one of our important executives that first took the view, which he announced in a number of public speeches, that he saw no reason for additional legislation on the subject of consolidations; that he was very much in favor of consolidation, but he saw no necessity for a change in the bill. That was Mr. Daniel Willard of the Baltimore & Ohio Railroad. I am authorized by him to say that in view of the overwhelming opinion of the other executives, and in deference to the views of the Interstate Commerce Commission, which are that there is additional legislation required, he is not going to press his views on that subject but will go along with the others and accept the view of the Interstate Commerce Commission.

Coming now to the bill itself, I shall not undertake to go into every detail of suggestions of the Law Committee or the suggestions that are presented here as coming from the Law Committee, many of which do not originate with the Law Committee but originate with other interests who have studied the bill in this cooperative effort to find the best expression for the law to contain. I shall not go into every detail of that, because I assume that at the proper time you will go into executive session and have your advisers here and look in a meticulous way at all the suggestions of amendments and determine whether or not you approve of them. But there are certain things which are of larger importance to which I shall allude.

I call your attention to what was in the old bill on page 1 and page 2 of the print I have before me in respect to the headings of the titles. The heading of the titles in the Parker bill and in the Fess bill as they now stand without amendments are, Title I, "Regulation of carriers"; Title II, "Unification of carriers."

A suggestion was made which did not originate with us, but which I think was a very wise one, that with those titles read in that way it would look like Title II, "Unification of carriers" might not be a regulation under the commerce clause of the Constitution, and, to obviate that possible criticism, the titles are made to read in this suggestion Title I, "Regulatory provisions—general," and Title II, "Regulatory provisions—unification of carriers," so as to indicate an affirmative expression on the part of Congress that in the legislation which it was enacting it was proceeding in pursuance of its regulatory powers—not in respect to general matters but in respect to these matters of unification.

In the definitions which will be found on page 2 and 3 the point was made that the definitions as they stood might include a holding company merely and not a company organized or authorized to engage in the business of a common carrier. The definitions as we propose them are intended to avoid that.

Senator BLACK. Mr. Thom, I want to ask a question in connection with page 2. Is this definition you give of interstate commerce a new definition?

Mr. THOM. No; I think that is accepted.

Senator BLACK. Is that the same definition which has been in existence?

Mr. THOM. In effect, it is.

Senator BLACK. What is the idea of a new definition of interstate commerce?

Mr. THOM. There is no new definition of interstate commerce which introduces anything else in the law than is now in it. The courts have put into the definition "but through any place outside thereof," it reading now "or between points within the same State or within the District of Columbia, but through any place outside thereof."

Senator BLACK. The particular part in which I was interested was in line 15 reading, "between points within the same State." Of course, that is limited, or I assume it is intended to be limited by something later.

Mr. THOM. Yes, "but through any place outside thereof."

Senator BLACK. What is the object of having that?

Mr. THOM. That is a definition of interstate commerce that the courts have set.

Senator BLACK. That is already a definition, then?

Mr. THOM. It is not in the definitions as printed in the law.

Senator BLACK. Here is what I was getting at: The Western Union Telegraph Co., for instance, has emasculated wholly the laws of the State. For instance, they will have a telegram to be sent 10 miles. They claim that has to go 150 miles into another State and back over the same line, and thereby they bring it within interstate commerce. This would permit the same thing if the railroad company had no particular objection to making it wholly an intrastate carriage, would it not?

Senator FESS. This, Senator Black, is where the actual line connects two points but does go through another State.

Senator BLACK. Would not that mean if it were carried through it? A message coming from Birmingham to Montgomery, Ala., a distance of 100 miles they claim has to go through Columbus, Ga., a distance of about 400 miles.

Senator FESS. Have you read the language beginning in line 15, on page 2, "or between points within the same State, but through any place outside thereof"?

Senator BLACK. But it does not say that particular line shall go that way. They might, for instance, circle around when they have a line that goes straight. The courts have specifically held that you can not go behind the way they actually transmit a message, and I assume they would hold the same thing with respect to the way you transmit freight or passengers.

Mr. THOM. That is intended to cover the actual transportation of freight or passengers.

Senator BLACK. And not the way it could go, by the shortest and most practicable route?

Mr. THOM. It only covers it if he goes that way.

81538—28—PT 1——6

Senator BLACK. If it goes that way irrespective of how it could have gone?

Mr. THOM. Yes.

Senator BLACK. Then they make it an interstate carriage, although it was not done exclusively for the purpose of getting the jurisdiction of the State?

Mr. THOM. But this law only applies if it actually goes through.

Senator BLACK. But these messages actually go through when they should not go through.

Mr. THOM. But messages are more easily diverted into some other route than the railroad and its tracks are. This does not refer at all to telegraph companies.

Senator BLACK. I understand that.

Mr. THOM. But it does refer to railroads, and the definition of interstate commerce as given by the courts is where commerce moves between a point in one State to a point in another, or between a point in one State to a point in the same State, but actually passed en route through another State.

Senator FESS. That is the idea that this is intended to cover.

Senator BLACK. I know that is the idea, but have they not held that that is made possible by regulations and by law? I am just asking for information. I did not understand why there should be an attempt made to make an additional definition of interstate commerce with reference to unification.

Mr. THOM. It is only to bring in the definition already given by the courts and which is inherent as to interstate commerce. Interstate commerce is a thing that is included in the Constitution.

Senator BLACK. That is correct.

Mr. THOM. And what is interstate commerce can not be affected by any legislative body. That is a thing that is a constitutional question. The courts have held that the constitutional expression of interstate commerce includes commerce between a point in one State and a point in another or commerce between two points in the same State but which passes en route through another State.

Senator BLACK. If that is already the law what is the object in putting a statutory definition there?

Mr. THOM. It is not an amendment that we proposed. It has been in all bills. It was in the original Fess bill.

Senator BLACK. You do not know the object of it?

Mr. THOM. Yes; the object is what I stated, but I think it would be there even if it were not expressed.

Senator BLACK. You think this does not add anything to the law or take anything from it?

Mr. THOM. That is what I think, Senator.

Senator WHEELER. In fact, you could not add anything to it or take anything from it.

Senator BROOKHART. You could add to the regulation that was included in this bill. There might not be every item of interstate commerce excluded. It might include some things and exclude others.

Senator FESS. I see what Senator Black has in mind. When we were discussing the regulation of busses, a matter that has not yet gotten final consideration, we had people before the committee stating that up in New England a bus route would be run so-and-so, but instead of taking a short cut between two points they would cross

the State line in order to make it interstate, and, therefore, avoid State regulation. I recognize what the Senator has in mind, but in the defining of interstate commerce here we go from one point here in Louisiana across Mississippi into another point in Louisiana, and it is from point to point in the same State; but we have gone across the State, and that is interstate commerce.

Senator BLACK. Supposing you do not necessarily have to do it. Here is my idea: I am opposed to any further usurpation because I think there has been some usurpation of the rights of the State with reference to interstate commerce. I think they have gone the farthest limits that they should be permitted to go, and, therefore, if it is not necessary I do not see any reason why it should be there. If it is necessary I am against it. I am against an extension if this extends it, and if it does not extend it I do not see any reason why it should be there.

Mr. THOM. Senator, may I make this suggestion? Of course, a railroad's location is fixed, thereby differing from the bus line to which Senator Fess had reference, and, more than that, this bill is not a regulation of the commerce that passes over a road. These definitions merely bring within the bill the carriers themselves, and those carriers are carriers that engage in interstate commerce, and interstate commerce is defined in the way that you refer to here which has been sustained by the courts. You are not in this bill extending the jurisdiction of Congress over anything but the carriers themselves. You are dealing with the unification of the instrumentality. What you have been referring to springs out of your experience where the question of the carrier or the transmitting instrumentality was not involved but where the operation was involved. The operation is not involved in this bill. You are dealing only with the instrumentality.

Senator BLACK. That is true, and I do not see any reason to give a definition of what interstate commerce is because you are really attempting to deal with what everybody already knows is interstate commerce transportation. Then why bring in another definition? A telegraph company deals both with the operation and with the line. They have two lines, one which circles outside the State and one which goes straight through it. They can go either way. If they choose, in order to take advantage of regulations which make them immune from liability, they could go through another State. The railroads could do exactly the same thing. Why make a definition of what interstate commerce is, unless it is intended as a regulation for the future?

Mr. THOM. So far as the railroads are concerned, this language is not printed in italics at all, and it is no change from the bills as they were introduced. They can get along in this bill without any definition of interstate commerce, if that is considered desirable. At the same time, I saw no objection to this because it is interstate commerce as defined by the courts.

Senator SACKETT. Does it not lock up the meaning of interstate commerce so far as this bill and all actions to be taken under it are concerned? Does it not lock it up against a change of court proceedings?

Mr. THOM. A change of what, Senator.

Senator SACKETT. A change of decisions by the court? Suppose the court should decide later on that they will reverse themselves. Does not this lock it up?

Mr. THOM. Yes; it does.

Senator SACKETT. Then, what is the need of it?

Mr. THOM. I can not say to you that there is any essential function to be performed in the definition of interstate commerce.

Senator FESS. Well, generally speaking, every bill explains under the titles the definitions of the terms that are used in the law. That is the practice that is always followed. The legislative drafting committee always does that.

Senator PINE. Congress has not heretofore defined interstate commerce in this way, has it?

Mr. THOM. You mean it has not used those words? Not that I know of.

Senator FESS. Here is Mr. Alvord of the drafting service. He can answer that if it would be in order now.

Senator COUZENS. May we proceed and take that up in executive session?

Senator BLACK. Yes; Mr. Chairman.

Senator COUZENS. Colonel Thom, you may proceed.

Mr. THOM. On page 3 you will observe that the declaration of policy is omitted, the omission beginning in line 15 after the period and running through section 202. All that is omitted.

Senator WHEELER. I do not quite understand that.

Mr. THOM. From line 15 on page 3 down to line 17 on page 4 is omitted.

Senator FESS. After the word "privilege" you strike out everything beginning with "and" on line 15 over to and including line 17 on page 4.

Senator WHEELER. What was the idea in cutting that out?

Mr. THOM. I am about to tell you. Before proceeding to deal with the declaration of policy, however, I ought to deal with that part in paragraph 4 on page 3, after the word "privileges" where bonds are excluded from the term "voting securites." That is omitted.

Senator WHEELER. You cut out "voting securities"?

Mr. THOM. Yes. And the balance of that paragraph which relates to bonds is truck out.

Senator WHEELER. What is the idea of that?

Mr. THOM. The idea is this: For bonds to have any standing at all in voting for or against consolidation they must be exercising a power conferred upon them by their contract, either in their mortgage or in their bond. Some bonds contain a provision giving the bondholder the right to vote under given conditions. Some mortgages contain a provision against consolidation without the consent of the trustee or without the consent of the bondholders. Now to recognize those contracts would be to recognize the power of private parties to limit the regulating power of Congress by private contract. It was thought—and that view is very impressive to me—that Congress will never consent to make a precedent where its power of regulating a public utility may be limited by the private contract of the parties.

Senator WHEELER. Let me understand you correctly. You say that some of the bonds that are issued by some of the railroad companies have a provision to the effect that there will be no consolidation unless the bondholder is satisfied.

Mr. THOM. Yes.

Senator WHEELER. But by this bill is not Congress passing a law abrogating a contract that has already been made by the bondholder and the company?

Mr. THOM. It is.

Senator WHEELER. Well, has Congress any right to pass such a law abrogating it?

Mr. THOM. It has.

Senator COUZENS. And it should have.

Mr. THOM. And it should have. I have an elaborate discussion on that question of law.

Senator WHEELER. I am not so sure that I agree with the chairman or the railroad lawyer when he says "should have."

Senator COUZENS. You are the last man that would have Congress regulated by private contract.

Senator WHEELER. No, but here is a contract that has been issued by a company already.

Senator COUZENS. Not with the consent of the Congress, through. It is a private contract and might very easily defeat the whole purpose of Congress. If a private contract could be produced along the lines just described, I for one would certainly not want a private contract shoved up here and have it said that we could not act because of a private contract between parties in which the Government had no voice.

Mr. THOM. Senator, that has been very frequently up before the Supreme Court, notably in connection with the antitrust law, where the private parties have undertaken to avoid the antitrust law by their contracts. The Supreme Court in case after case, in a memorandum which I will file here with you, takes the position that a system of law can not be tolerated where the power of Congress to regulate can be limited by the private contracts of the parties to be regulated. I, of course, can give the authorities if they are required at this point. It will take up a great deal of time, however.

Senator WHEELER. That is not necessary.

Mr. THOM. I have two briefs to file with respect to the power of Congress. One is a brief on this question and the other is a brief on the subject of the power of Congress to confer corporate powers upon State corporations. My general view was that unless it was desired that I should go into that question orally here I would file them as Exhibit No. 1 and Exhibit No. 2 with my testimony so that the authorities may be available for anybody that is interested in them.

Senator WHEELER. That is perfectly satisfactory to me.

Senator COUZENS. If the committee agrees, that will be done.

Senator FESS. This is one of the most seriously contested questions in the bill.

Senator WHEELER. I was not familiar with the provision, but I do want to find out what the reasons for it are.

Senator FESS. It has to be made very clear that we have the right to do that, if we get a favorable vote on it, because it does involve a rather serious proposition.

Senator WHEELER. Before we pass this legislation, if there are bondholders the committee ought to at least give them a hearing.

Mr. THOM. Senator, if I may read an extract from a single case you will see the line of decisions that the Supreme Court has made as referred to in this brief.

Senator WHEELER. If you are going to file your brief I will read your brief on that.

Mr. THOM. This is only a short quotation and is so much in point that it will express the idea that I have been trying to convey here. I read from the case of Louisville & Nashville Railroad against Motley, 219 United States, at page 482, the following expression:

> The agreement between the railroad company and the Motleys must necessarily be regarded as having been made subject to the possibility that at some future time Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable as to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist.

Senator WHEELER. I can conceive of a case where a man might invest his money in bonds upon the absolute idea that he was getting value received for his bonds, and I can then conceive that the railroads might go to work and make those bonds practically worthless by perhaps consolidating with some other concern. Somebody might say that that is inconceivable, but it is not inconceivable because of the fact that that very thing has been done with reference to stocks of companies within my own private knowledge.

Mr. THOM. As to the justice of that provision, you will see that there is an essential difference between the stockholder who is without security and the bondholder who has security. This bill undertakes to protect the bondholder in two ways; first, by expressly providing that his lien shall remain unimpaired by anything that is done; and, secondly, by requiring the company that acquires the other to assume responsibility, liability, for the bond in addition to the old company that disappears.

Now, it is thought that there is no legitimate interest of the bondholder that would not be taken care of in that way, and that such a possibility ought not to impair the power of Congress to regulate these railroads if it is in the public interest, and if it is in the public interest it ought to be done.

Senator WHEELER. If the bondholder is protected.

Mr. THOM. He is absolutely protected. Would you like me to turn to that clause?

Senator WHEELER. I think it would be well so we can clear it up as we go along.

Mr. THOM. On page 22 there is this provision:

> In the case of any such corporate consolidation or merger, the rights of creditors and all liens upon the property of any of the constituent or merging corporations shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence so far as may be necessary to preserve the same.

Senator WHEELER. I was just wondering how that would work out in practice, Colonel Thom?

Mr. THOM. I do not see any difficulty, Senator, as to how it would work out in practice.

Senator WHEELER. These may be elementary propositions that the rest of you know all about, but I am sure that I do not.

Mr. THOM. Well, suppose the New York Central were to take over another corporation that had a mortgage on its property.

What this bill provides is that the lien of that mortgage on the property on which it was given shall remain unimpaired and shall be enforceable against that property. It may be sold as it originally could be. There is no right of the creditor that is taken away from it. But by referring to page 21, at the bottom, you will see an additional paragraph (d), reading:

> All debts, liabilities, and duties of each of the merging corporations shall thenceforth attach to the continuing corporation, and become and be its debts, liabilities, and duties and be enforceable against it to the same extent as if such debts, liabilities, and duties had been incurred or contracted by or imposed upon it.

Senator WHEELER. I think that would settle it.

Mr. THOM. I think that covers it, and I do really believe, speaking outside of my obligation as a witness, that it is of the utmost importance for Congress to preserve the attitude that its power under the Constitution can not be abrogated in any way by private contracts of the people with whom it is dealing. I believe that is a sound proposition.

Senator SACKETT. May I ask a question at this time, Colonel Thom? Consolidation takes place and a bondholder has a defaulted mortgage. The only relief of the bondholder is the sale of the property. How can that property be sold outside of the consolidation?

Mr. THOM. Because if the contract calls for it to be sold whoever buys it will bring it into the consolidation.

Senator SACKETT. Is not that a limit on the bondholder that he can not get the price for his bonds?

Mr. THOM. I think that is entirely offset by the obligation that he receives from the continuing corporation to see to the payment of that debt.

Senator SACKETT. That implies that the continuing corporation is going to be solvent.

Mr. THOM. But there are two things which give adequate protection to the bondholder.

Senator SACKETT. Is not that limited by the bondholder's judgment as to what is sufficient protection to his rights?

Mr. THOM. I think Congress has a right to do that.

Senator WHEELER. I think a person should differentiate between Congress passing a law now and saying that these bonds have not any force and passing something for the future.

Mr. THOM. All these cases refer to what is done prior to the act. The Motley case, which I suppose Senator Sackett is very familiar with, as it comes from Kentucky, was a case where there was a contract made long before there was any regulation of the particular subject which was thought to override the contract in that case. It antedated it. The court said that no matter if it does antedate it the power of Congress to exercise regulatory power to the full extent can not be limited by this contract which must give way, if necessary, to the regulating power.

Senator WHEELER. I feel that the bondholder or stockholder should have some assurance when he buys his bonds or stock that he is not going to be juggled out of them.

Mr. THOM. There is provision here for the payment of the stock, and in the draft of the bill which is presented there is considered to be ample protection, and I think it will be so considered by the investing public.

I file here now instead of reading it a memorandum made on the power of Congress to legislate as it does in this bill in respect to the bonds, this memorandum having been prepared by Mr. J. P. Blair, general counsel of the Southern Pacific Co. It is very well prepared and I adopt it and file it as Exhibit No. 1 for the purpose of showing the power of Congress in this respect. Mr. Chairman, I would like to have that printed at the end of what I say, if that be satisfactory to the committee.

Senator COUZENS. That may be done.

(The memorandum above referred to will be found at the end of Mr. Thom's statement.)

Mr. THOM. Now I come, after that explanation, to this declaration of policy which is omitted. Senator Wheeler asked why that was done. It was not done through any desire of ours. When the House committee got to the consideration of the bill they objected to making any declaration of policy and instead changed it into an authority for unification. I must say that if I were a Member of the House I should prefer to vote for a declaration of policy. Not being a Member of the House and being interested in the general question, I would prefer to have in the bill a declaration of policy rather than what the House proposes. But we were dealing with a practical question, and when we came to amendments we had to deal with the situation as we found it. Accordingly, we leave the declaration of policy which the House seemed to object to and we put in and slightly changed the authorization for unifications, which from a legal standpoint I suppose is sufficient.

We have changed that authority for unifications slightly from that which was proposed tentatively in the last draft of the House bill. Our change is intended to cover this aspect of it: It was considered that as drawn by the House committee there were very rigid requirements of what the commission should find before they had authority to approve a unification, and that some of those requirements related to matters of the future about which there can be no real finding of facts.

We thought that it ought to be expressed as a matter of opinion by the commission instead of an absolute finding of facts, and, as a consequence, we suggested that this be made to read, "When in its opinion certain things exist the authority shall be given them to take action," rather than to find that certain things absolutely do exist which the future alone can disclose.

There is one provision here, and the only one I know of, that constitutes a difference between us and the National Industrial Traffic League. Paragraph (1) of section of 202, beginning at line 19 on page 4 and going down to line 1 on page 5, reads as follows:

> The unification through any method or procedure provided for in this title, of carriers or property of carriers, is hereby authorized, and the commission shall carry out the provisions of this title in such manner as in its opinion will protect the public interest, preserve necessary weak or short lines, prevent any undue lessening of existing carrier competition in service in cases where such competition is deemed by it essential to the public interest.

Now that expression that I have just read is just as it is in the House committee's tentative bill, but I understand that our friends of the National Industrial Traffic League want to change that to read something like this:

> Prevent any substantial lessening of existing carrier competition in service—

And so forth. Our objection to that is that almost inevitably you will find a consolidation will do away with some competition and perhaps with some substantial competition; but that if the destruction of that competition is found or considered by the commission in the public interest, the commission ought to have power to permit it. I will give you this illustration. Suppose that between two of the lines that are to be consolidated there now exists competition which would be considered substantial. It is proposed to bring both of those lines into a system.

Senator WHEELER. Such as the Northern Pacific and the Great Northern?

Mr. THOM. Well, any two. It is proposed to bring them into a system. It may very well be that many shippers over lines in that system before they are brought in are paying rates higher than they would pay if the service which they receive alone had to be considered, it being the existing law that the railroads in a group where rates are fixed shall be fixed at a point intended to preserve the weak lines in that section, and, therefore, on the more prosperous lines the patrons are paying rates higher than they would on the economic merits of that rate in order to support some other line. Of course, that is a very objectionable situation. No man ought to be required to pay a higher rate than the economic merits of the situation require, and if he is required to do it he is being penalized in some sense. He is being dealt with in rather a harsh manner because his money is taken in a greater amount than he would otherwise pay, but what he pays in excess does not come back to him through any method, but it goes to the Government and it is otherwise disposed of and he is finally deprived of that amount.

Now, suppose that the commission should find that in bringing in these roads, on which considered alone there is some substantial competition, but a system will be formed whereby the rates in the whole system could be fixed upon their economic merits and nobody overcharged——

Senator WHEELER. How are you ever going to get rates reduced in this country, no matter how many consolidations you have, if you keep boosting valuations of the railroads, as has been going on in the last few years?

Mr. THOM. I hope you will not divert me into what is a discussion of this whole rate situation and the whole valuation situation.

Senator WHEELER. I am not trying to divert you, but in my humble way I am calling your attention to the absurd situation being made here for consolidations and reducing rates when every movement that the railroads are making with respect to the proposition of valuations is to at least keep them from being reduced or eventually increase the rates.

Mr. THOM. I wonder if your attention has been called, Senator, to the fact that, since 1921, there have been between three and four billion dollars reductions in rates.

Senator WHEELER. Yes; my attention has been called to some of the figures that the railroads have claimed, but I have not checked them up yet, and I am from Missouri when I see those figures issued.

Mr. THOM. Do you not think that it would be rather fair, before you criticize their apparent incorrectness, to ascertain whether or not they are incorrect?

Senator WHEELER. I have not criticized the apparent incorrectness of the figures. I have criticized the increasing of the valuations of these railroads, and not only have I criticized the increasing of the valuations, but I think, candidly, that some of the things that have been going on in the valuation of these railroads down here by the Interstate Commerce Commission ought to be investigated. I think, if some of the information I get is correct, that it is rather scandalous, to be perfectly frank about it.

Mr. THOM. Are you aware of any increase that has taken place in the valuation of these railroads?

Senator WHEELER. Yes.

Mr. THOM. What increase has there been?

Senator WHEELER. I can not give it to you offhand, but I can check it up and give it to you.

Senator BROOKHART. I can give you about $7,000,000,000 offhand.

Mr. THOM. I understand that there had been no valuation of the railroads that had been finally passed on.

Senator WHEELER. By the Interstate Commerce Commission.

Mr. THOM. That had been finally passed on.

Senator WHEELER. You mean by the Supreme Court of the United States?

Mr. THOM. Yes. There is, therefore, practically no valuation in effect, but the contention of the Interstate Commerce Commission in respect to valuation is that they must value properties that existed prior to 1914 at unit costs at that time and before, no matter how much they have increased since.

Senator COUZENS. We will have to stop this discussion now, I think. It is 12 o'clock and, in line with our program, we will adjourn until 10 o'clock to-morrow morning.

EXHIBIT No. 1

RAILWAY UNIFICATION LEGISLATION—PROVISIONS IN MORTGAGES INTERFERING WITH UNIFICATION

SOUTHERN PACIFIC CO.,
New York, December 23, 1927.

ALFRED P. THOM, Esq.,
902 Transportation Building,
Washington, D. C.

DEAR MR. THOM: Some time ago I gave you a few authorities supporting the power of Congress to render unenforceable provisions in railroad mortgages conditioning, etc., consolidations. For possible use in your testimony before the committees of Congress I now give you a more complete list of the cases, viz:

Legal Tender cases. (12 Wall. 457, 549.)
Addyston Pipe & Steel Co. *v.* United States (1899). (175 U. S. 211, 228, 229.)
Atlantic Coast Line *v.* Riverside Mills. (219 U. S. 186, 202.)
Louisville & Nashville R. R. *v.* Mottley (1911). (219 U. S. 467.)
Philadelphia, &c., R. R. *v.* Schubert (1912). (224 U. S. 603.)
New York Central, etc., R. Co. *v.* Gray (1916). (239 U. S. 583.)
Thornton *v.* Duffy. (254 U. S. 361, 369.)
New York *v.* U. S. (1921). (257 U. S. 591, 600.)
United States *v.* Southern Pacific Co. (259 U. S. 214.)
Continental Co. *v.* U. S. (259 U. S. 156, 170.)

For cases where a complete frustration or termination of private contracts by act of Congress was held to give no right to damages or other relief, see Calhoun *v.* Massie (1920) (253 U. S. 170, 176); Omnia Co. *v.* U. S. (1923) (261 U. S. 502).

Yours truly,

J. P. BLAIR, *General Counsel.*

CASES SHOWING THAT CONGRESS, UNDER ITS AUTHORITY TO REGULATE COMMERCE, HAS POWER TO PROVIDE FOR MODIFICATION OF EXISTING CONTRACTUAL STIPULATIONS BETWEEN PRIVATE CITIZENS AND/OR CORPORATIONS, OR TO LEGISLATE IRRESPECTIVE OF EXISTING CONTRACTS WHEN SUCH CONTRACTUAL STIPULATIONS INTERFERE WITH ITS POLICY IN RESPECT TO INTERSTATE COMMERCE

Addyston Pipe & Steel Co. *v.* United States (175 U. S. 211) was a proceeding begun in behalf of the Government under the antitrust act to enjoin the defendants from carrying on a combination in restraint of trade and commerce. The trial court dismissed the petition, but on appeal to the Circuit Court of Appeals (opinion by then Circuit Judge Taft) the judgment was reversed, with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast iron. In the Supreme Court of the United States appellants took the position that even if the contract between the defendants did substantially operate as a restraint upon and a regulation of interstate commerce, the power of Congress to regulate interstate commerce did not include the power to interfere with private contracts between citizens. In disposing of this contention the court said (p. 229):

"The power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially * * * regulate to a greater or less degree commerce among the States."

Earlier in the opinion the court stated:

"Under this grant of power to Congress [to regulate commerce] that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the nature and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. * * * The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty, or property without due process of law."

Whereas the contract in the Addyston Pipe case was made after the passage of the antitrust act, the principles there laid down are of equal application where the making of the contract precedes the passage of the statute. In Louisville & Nashville R. R. *v.* Mottley (219 U. S. 467) it was urged that when a private citizen had made a lawful contract, had executed that contract fully so far as his obligation was concerned, and had parted with his money or property on the faith of the inviolability of his contract, that contract could not be disturbed merely because Congress has power to regulate interstate commerce. In that case it appeared that in 1871 in settlement of a claim for damages for personal injuries, the plaintiffs had entered into a contract with the railroad company whereby the latter agreed to give them free passes during their lives. After the act of June 29, 1906, the railroad company refused to comply with the terms of the agreement. It was held that the company rightfully refused to issue free transportation to the plaintiffs thereafter. Said the court (p. 482):

"The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist."

The court approves the language of Judge Cooley in Kentucky & Indiana Bridge Co. *v.* Louisville & Nashville R. Co. (34 Am. & Eng. R. cases, 630) where he remarked:

"The act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to * * * But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into

contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable."

The case of Philadelphia, etc., R. R. *v.* Schubert (224 U. S. 603) is somewhat similar to the Mottley case. Schubert sued to recover damages for personal injuries sustained in 1908 while employed by the defendant as a brakeman. The company filed a special plea that he was at the time a member of its relief fund under a contract of membership made in 1905, in which it was agreed that a certain sum as a voluntary contribution should be take from his wages each month as dues to the fund, out of the general funds of which he would be reimbursed for injuries suffered; and that he had accepted benefits from the fund for this accident which under the terms of his contract was a bar to the action. A demurrer to the special plea was sustained and Schubert recovered a judgment which was affirmed. In the Supreme Court the question presented was as to the validity of a portion of the employer's act of April, 1908 (which provided that exemptions from liability should be void and that the acceptance of benefits under a relief contract would not be a bar to a recovery at law), upon which the lower court based its ruling as to the insufficiency of the special plea. The judgment was affirmed, the court holding that Congress has the power in its regulation of interstate commerce to legislate irrespective of any existing contracts which are in conflict with its policy. At page 613 the court stated:

"The power of Congress in its regulation of interstate commerce * * * to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."

In Thornton *v.* Duffy (254 U. S. 261) the State of Ohio under its workmen's compensation laws first allowed employers in certain cases to pay directly to their workmen or dependents the compensation provided by law instead of contributing to the State fund established to insure such payments. Later the State took away this privilege for employers who indemnified themselves by insurance. It was claimed that the change impaired the constitutional rights of contract or property of an employer who had elected to take the privilege of direct payment and had insured himself with an insurance company before the change in the law was made. The court refuted this contention, saying at page 369:

"An exercise of public policy can not be resisted because of conduct or contracts done or made upon the faith of former exercises of it upon the ground that its later exercises of it upon the ground that its later exercises deprive of property or invalidate those contracts."

New York *v.* United States (257 U. S. 591 (1921)) was a bill in equity brought by the State against the United States and the Interstate Commerce Commission to annul and enjoin the enforcement of an order of the commission requiring interstate railroads operating in New York to charge in such commerce 3.6 cents a mile for passengers, etc. The State contended that inasmuch as it had a charter contract with the New York Central to the effect that it would not charge more than 2 cents a mile between certain points, the order of the commission was invalid as an undue interference with its existing contractual relations. On this point the court said at page 600:

"The next objection is that the State has a charter contract with the New York Central Railroad Co. by which the latter is bound not to charge more than 2 cents a mile for passenger carriage between Albany and Buffalo and that if the transportation act permits the Interstate Commerce Commission by such an order to enable the railroad company to violate its contract, it impairs the obligation of a contract in violation of section 10, Article I, of the Federal Constitution. That section provides that 'no State shall * * * pass any * * * law impairing the obligations of contracts,' and does not in terms restrict Congress or the United States. But it is said that it deprives New York and her people of property without due process of law. We said in Addyston Pipe & Steel Co. *v.* United States (175 U. S. 230) 'Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.' Louisville & Nashville R. R. Co. *v.* Mottley, supra."

In United States *v.* Southern Pacific Co. (259 U. S. 214) the principles declared in Addyston Pipe & Steel Co. *v.* United States, supra, and Philadelphia, etc., R. Co. *v.* Schubert, supra, were approved, the court declaring at page 234:

"It is authoritatively settled by decisions of this court that no previous contracts or combinations can prevent the application of the Sherman Act to compel the discontinuation of illegal combinations. After Congress exercises its authority to regulate interstate commerce conduct becomes illegal which has the effect of contracts * * * to restrain the freedom of interstate trade."

The Southern Pacific case and the Schubert case were cited with approval by the Supreme Court in the case of Continental Co. *v.* United States (259 U. S. 156) (a branch of the Reading Co. case), where it was held that the court had power under the Sherman Act in dissolving a combination of two corporations to disregard the letter and legal effect of a general mortgage of their properties and of the bonds secured thereby, in order to achieve the purpose of the act. The decree of the district court for dissolution of the railroad and coal companies left the capital stock and properties of the coal company subject to the lien of an outstanding general mortgage covering also much of the property of the railway company, payment of which, as between these two, was assumed by the railway company, provision being made that the coal company should give a new mortgage of all its property to secure bonds to be delivered by it to the railway company in the adjustment of their financial relations. The Supreme Court disapproved this part of the decree because it felt that it would leave in the railway company some possible measure of future control over the coal company; and the court ordered that the decree should modify the liability under the general mortgage and bonds so that the obligation of each mortgagor company upon the bonds, and the lien upon its property, should be reduced to an amount proportionate to the ratio of the value of its property subject to the mortgage to the value of all the property so mortgaged and should make specific provisions for foreclosure of the resulting separate liens in case of default.

That the above modification involved a departure from the contract provisions of the general mortgage and the bonds it secured was no stumbling block. Said the court at page 170:

"The petition of the trustee under the general mortgage urges that a court of equity ought not by its decree summarily to wrench the coal company's property from under the pledge of the mortgage, or vary its terms in view of the circumstances. * * * The petition avers the innocence of any wrongdoing on the part of the bondholders and alleges that of the $106,000,000 of bonds issued $50,000,000 were issued at or about the date of the mortgage in 1896, $36,000,000 were issued between 1897 and 1920 to take up and in exchange for underlying bonds that were liens prior to reorganization and for the most part prior to the passage of the Sherman Act, and $20,000,000 were issued between 1898 and 1911 for betterments. It further alleges that for 20 years after this mortgage was executed its validity, as far as the bondholders are concerned, has not been questioned by the Government, and these bonds have passed through the hands of numerous and widely scattered holders. * * *

"The power of the court under the Sherman antitrust law to disregard the letter and legal effect of the bonds and general mortgage under the circumstances of this case, in order to achieve the purpose of the law, we can not question. The principles laid down and followed in the case of United States *v.* Southern Pacific Co., decided to-day, leave no doubt upon this point. Indeed the case which we there cite, Philadelphia, etc., R. Co. *v.* Schubert (224 U. S. 603, 613–614), is a stronger instance of the power of Congress in regulating interstate commerce to disregard contracts than is needed in this case, because there it was enforced as to a contract made before the regulation."

And while, as the court said, it had "no desire to vary the security of the bondholders more than seems necessary to effect fully the purpose of the law" (p. 173), it will be seen that the court did not hesitate to modify the contractual relations existing between the bondholders and the mortgagor companies where a modification was necessary in order to accomplish the intention of Congress.

(Thereupon, at 12 o'clock noon, the committee adjourned until 10 o'clock a. m., January 12, 1928.)

CONSOLIDATION OF RAILWAY PROPERTIES

THURSDAY, JANUARY 12, 1928

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10 o'clock a. m., in the committee room, Capitol Building, Hon. James Couzens presiding.

Present: Senators Couzens, Fess, Pine, Sackett, Wheeler, and Wagner.

Present also: Senator Brookhart of Iowa.

Senator COUZENS (presiding). The committee will please come to order. Colonel Thom, you may proceed now.

STATEMENT OF ALFRED P. THOM, GENERAL COUNSEL, ASSOCIATION OF RAILWAY EXECUTIVES, WASHINGTON, D. C.—Continued

Mr: THOM. Mr. Chairman, I am sorry that Senator Sackett is not in the room at the moment. I wanted to make a correction at the outset in an answer that I made to him yesterday.

Senator FESS. The Senator will be here later.

Senator COUZENS. Suppose you reserve that until he comes in.

Mr. THOM. Well, as soon as Senator Sackett comes in I will make that correction.

When we adjourned yesterday section 202, on page 4 of this bill was under discussion. In regard to paragraph 1 of that bill I would like to call attention to lines 2 and 3, on page 5, which now read as follows:

and bring about ultimately the establishment of a number of strong, efficient, and well-balanced systems.

Our construction of that language is that that use of the words "well-balanced" is broad enough to include, and that it does include, well-balanced as between the several systems, but there is one of our executives to whom I made reference yesterday, whose opinion I very greatly respect, Mr. Willard, who asks that if that is the idea that it be expressed in a way that will certainly exclude controversy. So far as we are concerned, we are very glad to do that; so I would ask that those words be made to read instead of as they are now, as follows:

and bring about ultimately the establishment of a number of strong and efficient systems well-balanced as between themselves.

Senator COUZENS. What was the interpretation that Mr. Willard made?

Mr. THOM. His idea was that the words might be interpreted to mean "well-balanced internally"; but every one who had anything to do with the consideration of this text agrees that it is broad enough to include well-balanced as between the systems themselves.

Senator COUZENS. What would you understand to be the meaning of the phrase "well-balanced internally"?

Mr. THOM. Well-balanced as to the kind of traffic that they carry and that is open to them.

Senator FESS. Will you read it as it would be?

Mr. THOM (reading):

> And bring about ultimately the establishment of a number of strong and efficient systems well-balanced as between themselves.

Senator Pine yesterday as we adjourned called my attention to another phrase in that same paragraph which will be found in lines 5 and 6, the phrase being, "to maintain as far as practicable the existing routes and channels of trade and commerce," and he desired to know the reasons in support of that phrase.

Senator PINE. Then I would like to have your opinion as to whether that will prevent the free competition between the carriers and between different parts of the country.

Mr. THOM. Objection was made to the inclusion of that same phrase before the House committee. It is in the present law, but it was omitted from the Parker bill as introduced on the 3d of last March after a good deal of discussion in the House committee.

Of course, I was not present at that discussion before the House committee, as the committee was in executive session, and I do not know what was said for and against that proposition, but when the objection was again raised a week or two ago in the hearing before the House committee, when Mr. Hall, who was on the stand, made use of that phrase, I undertook to confer by telegram with the gentlemen that I thought attached importance to that phrase. One of them was Judge Lovett. He is in Pasadena. I have from him a long telegram, and I will give now, before saying anything about it myself, reasons which he telegraphed me in repsect to it. He says:

> Answering your telegram, I consider the repeal of existing law requiring the commission to preserve existing routes and channels of trade and commerce to be maintained wherever practicable would be very unwise. It would put new difficulties in the way of consolidations and unifications. It would open the door to numerous ambitious trade centers to seek concessions from carriers formulating plans or to intervene before the commission, prolonging proceedings and producing fights with other trade centers. Furthermore, it would afford opportunity, though possibly remote, for arousing partisanship among commissioners from different localities. * * * But the lines I represent have no special interest in matter, and certainly I have none personally. My only purpose personally is to aid in perfecting the bill as far as possible and avoiding senseless and injurious mistakes. I believe you ought to emphasize as effectively as you can the objections above suggested, if you agree with them, and any others that occur to you, not in the interest of any particular line or locality, but for the general welfare.

That was the view that Judge Lovett telegraphed me in respect to the matter. He was an advocate in our meetings of having those words inserted.

Senator PINE. Does not that freeze conditions?

Mr. THOM. My personal idea is that whether those words are in bill or not, when any application is made to a commission for approval of a plan, the commission will inevitably give attention to the question of how that affects the present channels of trade and commerce. If they find it affects it adversely and that the public interest does not justify that, they will decline. If they find it does not affect them adversely, so far as that goes, they will approve.

In view of the objections that there are to it, and in view of the fact that there may be a public interest promoted by the possible changing of these channels of trade and commerce, I myself believe it is a proper thing to be left to the commission, and I do not regard the retention of those words as essential.

Senator FESS. Colonel Thom, there is not much doubt that in theory the commission ought to be free. That appears to me to be obvious. But how far would they get in legislation if there were any suspicion that some line was going to be eliminated or abandoned or changed; that the route that is already established might be changed or substituted for some other route? I think it would be a very serious thing. But economically and theoretically it does appear to me that it ought to be omitted. Practically we would have the same thing that we are having on the Shipping Board. Nearly everything that I am getting on shipping matters is to preserve the existing routes, and that is largely selfish, but it does give it tremendous force.

Mr. THOM. Senator, it seems to me that there is some difference between preserving a route by water and preserving one by land. You have to keep the ships on the route to preserve the water routes. You will have the railroads in the same place they are now, and it is on the question of so grouping them that it will, as far as practicable, preserve the way that trade is now moving, or make some other arrangement for the movement of the same trade to the same destination. It might go by a different route, but both routes would be preserved, and I think inevitably the Interstate Commerce Commission will give consideration to a community that says:

> If this proposed unification is allowed we are eliminated from our present position of importance.

The commission's every inclination would be to preserve trade relationships that have already been developed and established, but there may be some countervailing interests that would require that that consideration be ignored in view of some larger interests in some other direction.

Senator FESS. I concede all that.

Mr. THOM. So I am not very much concerned, as far as I am personally concerned. Judge Lovett is anxious that it be preserved because he thinks it is wise; and I lay the matter before you just in that way.

Senator FESS. Mr. Chairman, all the suggestions in the form of amendments we will make note of to be considered in executive session.

Senator COUZENS. I assumed that before we reached the question of amendments we ought to see that these things are properly set out.

81538—28—PT 1——7

Senator FESS. You are not making a suggestion of an amendment there, then, Colonel Thom?

Mr. THOM. No; I am stating both sides of the question and leaving it to the consideration of the committee to say what they think is best. I did make a suggestion with respect to lines 2 and 3.

Senator FESS. Yes; I have noted that.

Mr. THOM. I come now to paragraph 2 of section 202. It is the purpose of that paragraph to prohibit, as the original Fess bill did, the unification of carriers or their properties, directly or indirectly, after the enactment of this law, unless unification is in accordance with the provisions of this title or with an order of the commission under paragraph 2 of section 5, with the exceptions to be found in line 15 and following. Those exceptions are that the carriers may, in the exercise of any power conferred by State authority and in accordance with State law, do certain things in the way of an acquisition of stock. The consideration of those exceptions brings in necessarily the consideration of paragraph 2 of section 205, which paragraph will be found on page 9 of this print.

Senator FESS. There was some haziness about that paragraph formerly when Commissioner Hall was testifying.

Mr. THOM. Yes. That paragraph confers upon the commission authority and power to approve and authorize the acquisition of additional securities when application is made by the owner of some of them, and Mr. Hall when he was on the stand wanted to know what the reason was for that. I gave a reason at the moment and it was the subject of some further questioning in the committee, and I said to the chairman that I would have a witness on the stand that was specially interested in that view of this matter. I thought I knew who he was and immediately upon adjourment of the committee I got in touch with him, but he said that I was mistaken in thinking that he had any particular interest in the matter.

After consideration and in view of the difficulties that would be raised by the exercise of that power, to which I will now advert, I do not see any reason why that paragraph should be continued if a change is made in paragraph 2 of section 202, to which I will presently refer.

The practical difficulty of requiring application to be made to the commission for authority to acquire stock is that it gives notice to the holders of the stock that is sought that the applicant wants to buy it, and immediately it affects the price. As a practical matter, it would put quite a burden on anybody who wanted to acquire stock if they had to give that sort of notice that such was the purpose; and if possible some method should be devised by which the stock could be bought on the market without such notice, if thereby no public interest would be impaired.

So that it seems to me that very properly, if a carrier now possesses power to purchase stock under State law, that power might be continued, if the purchase of that stock does not run counter to the Federal antitrust law. If it does, it must come under this act. But where there is no question of the Federal antitrust laws, and the State law permits it, my proposal to you is to so amend this paragraph 2 of section 202 as to make it read as follows: Reading now from line 19, omit everything after the word "carrier" in that line, the whole

of line 20, the whole of line 21, all of line 22 down to and including the word "acquired."

Senator COUZENS. That is on what page?

Mr. THOM. That is on page 5. And insert in lieu of the omitted part the following: "if not contrary to the antitrust laws of the United States," so that the provision would read this way:

but the provisions of this title shall not be held to prohibit, in the exercise of any power conferred by State authority and in accordance with State law, (a) the acquisition by any carrier of securities issued by another carrier, if not contrary to the antitrust laws of the United States.

And then change the "(c)" in line 22 to "(b)."

The effect of that would be to permit a carrier, if it has a power under State law to acquire stock, the acquisition of which is not prohibited by the antitrust laws of the United States, to continue to exercise that power.

Senator FESS. Would the phrase "antitrust laws" be sufficient without stating separately the law?

Mr. THOM. I have come to the conclusion that it would, although on page 17, in lines 6, 7, 8, and 9, you will see that there is a more definite reference to what the antitrust laws are. I thought that for this purpose it would be sufficient, but I would suggest that you take that up with your draftsmen. I have given you the idea that I want to convey, and your draftsmen will tell you whether or not what I suggest in general terms is considered by them adequate to accomplish the purpose.

On page 6, in line 2, you will come to a term which was criticized by Mr. Hall in his testimony, the word "property." The connection is the formation of a subsidiary corporation and the acquistion of all or any part of the securities thereof for the construction, use, ownership or control of branches, terminals or other property. Mr. Hall's criticism was that the word "property" here used is a very broad term and should in some way be restricted to indicate that it was not to be used for some purpose not contemplated by this act, and that as it stands, it is much broader than the draftsmen had in view. I would suggest adding after the word "property", to carry out his view, the words "to be used as a part of such branch or terminal facilities."

Senator FESS. That is what you had in mind when you used the words "or other property"?

Mr. THOM. That is what I had in mind. He had in mind what he called accessorial uses, and we put in the suggested words for the purpose of indicating this in terms.

Senator FESS. Do you not agree, Colonel Thom, that that is rather indefinite? I mean the words "or other property"?

Mr. THOM. I think there is some ground for that objection.

Senator FESS. It seems to me that it is quite broad.

Mr. THOM. In view of the recognition of that, I make the suggestion of this qualification which I think cures that trouble.

We come now to the very important part of the bill, on page 6, which indicates the different methods by which the unification can be carried out. There is, first, the acquisition by or transfer to one of the petitioning carriers, or to any other carrier, by purchase, sale, exchange, lease, or otherwise, of property. I do not think that requires any comment.

Then, in line 16 you will see the suggestion of a change in paragraph (b). The old wording was, "A corporate merger or consolidation of two or more carriers into one of the petitioning carriers or any other carrier corporation." It is deemed by many of our best thinkers and advisers that it is exceedingly important not to confuse the terms "merger" and "consolidation." In law they are two entirely different terms. They have an entirely different significance, and if you say merger or consolidation the question arises whether you are dealing with them as convertible terms. Consequently, we suggest that you treat "merger" by itself and "consolidation" by itself. In order that I may be perfectly understood in what I am about to say, I will give here the definitions of the word "merger" and of the word "consolidation" as I think it is established in the law.

Senator PINE. Can you include the word "unification," or has it been determined?

Mr. THOM. That has not been determined and we use it as a word broad enough to include all forms of bringing those properties together into a single unit.

Senator FESS. I think that in the public mind, Colonel Thom, merger has always been regarded as a division of consolidation, consolidation being the general term and merger one of the forms of consolidation.

Mr. THOM. That may be, but the definitions given by the courts do not sustain that view.

Senator FESS. That is why this discrimination is very important. I want you to go into that.

Mr. THOM. The merger of two or more corporations takes place when one of them survives and the property and franchises of the other pass into it. A consolidation takes place, under the definitions, when all of the old corporations disappear and there springs up a new one as a result of the process.

Senator Pine may be particularly interested in knowing that that matter has been passed on in a very thoughtful case in Oklahoma. I refer first to a case from Alabama State *v.* Atlantic Coast Line Railroad, 202 Alabama, 558, and I will read from that case what the the court says as to the difference between consolidation and merger. The court says:

> Accurate logicians very properly distinguish between the meanings of "consolidation" and "merger." Strictly speaking, a consolidation means the unifying of two or more corporations into a single new corporation, having the combined capital, franchises, and powers of all of its constitutents. And, strictly speaking, a merger means the absorption of one corporation by another, which retains its name and corporate identity, with the added capital, franchises, and powers of the merged corporation.

Then, omitting some things that are not pertinent at this point, the court continues:

> For most purposes, however, and apart from mere questions of identity, the result is in each case practically the same; and so it is that courts and text writers have usually used the terms "consolidation" and "merger" interchangeably, and, in cases of doubt, conjunctively, to express the idea of complete corporate union, whether a new corporation nominally results, or whether a constituent corporation is nominally preserved.

I will now read from the Oklahoma case of Collinsville National Bank *v.* Esau, 74 Oklahoma 45, where the following language is used.

> A "consolidation" takes place where two or more existing corporations are united in a single corporation, and the existence of the united corporations is terminated, and the organization succeeds in a general way to the franchise and acquires the property and assets and assumes the debts and obligations of the constituent companies.
>
> In ordinary legal phraseology, the term "consolidation" is generally used to indicate the act and result of uniting two or more corporations into one under a new name. A "merger" takes place where one of the constituent corporations remains in existence absorbing or merging in itself all the other companies. In a merger of two or more companies, one of the merging corporations continues to survive and succeeds to the franchise and acquires the property and offsets of the other constituent corporations; that is, the merger consists from the uniting of two or more corporations by the transfer of the property to some one of the existing corporations, which continues its existence while the others are swallowed up or consumed by the one that survives. It differs from a "consolidation" wherein all the corporations cease to exist and unite in the interest of a new one.

I will insert also for your consideration and use, if you see fit to examine the question further, although the two expressions I have used are the most satisfactory that I have found, the case of Railroad Co. *v.* Georgia, 98 U. S. 359, at page 363, where the Supreme Court of the United States uses this language:

> That generally the effect of the consolidation, as distinguished from a union by a merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases and it seemed to be a necessary result.

See also the case of McMahan *v.* Morrison, 16 Indiana, 172, and the case of Lauman *v.* The Lebanon Valley Railroad Co., 30 Pennsylvania, St. 42.

I wish to emphasize the difference between those two terms, merger and consolidation, because it runs through this bill. The difference as they are defined by the Alabama court and the Oklahoma court and the Supreme Court of the United States is sought to be respected in the way that this draft is made. So that our suggestion of a change on page 6, in lines 16 to 22, is to separate the method of unifying corporations by merger from the method of unifying corporations by consolidation. At that point it probably would be desirable for the committee to turn to section 211, page 19 and following. That section has been recast in order to separate distinctly the effect of an order of a commission in the case of a consolidation from the effect of an order in respect to a merger, and to state the effect of each separately from the other.

I want to say that we are indebted for that redraft to Mr. Alvord, who made the redraft of section 211 in view of this suggestion that the two should be kept separate. That was specially desired by Judge Lovett. He is of opinion, and I quite agree with him, that the process of merger is going to be resorted to as a practical matter very much more largely than the process of consolidation. Take his own system, for example. He has the Union Pacific. Doubtless it will want to make a unification of the Union Pacific with the Oregon Short Line and with the Oregon and Washington Navigation Co.; but manifestly, too, he will want to preserve the Union Pacific, and it will all be done by merging the others into the Union Pacific.

Take the New York Central. Its name is worth a great deal, and if it makes a unification with any other company, naturally it would take the other company into the New York Central system, and that would be a merger. In view of that fact, we have thought it very

desirable to keep the distinction clear in the way this bill is presented between the process of consolidation and the process of merger.

At this point also I would like to call attention to paragraph 3 of section 203 which begins in line 3 on page 7, where it is distinctly stated that nothing in the title shall be construed to authorize or provide for the creation of a Federal or national corporation. I have never considered that there was any danger, from a practical standpoint, of a Federal corporation growing out of such a law; but here is a great body of officials, the State authorities, who have sent their representatives here to call attention to what they conceive to be the danger of that.

I also at one time was an advocate, as Senator Cummins was an advocate, of a code providing for Federal incorporation. That was dropped because of the opposition which it created and because it was conceived that this whole proposal could be carried into effect without resorting to a system of Federal incorporation, and that, therefore, if there was going to be very great opposition to that view, it was better not to urge it as a part of this bill.

The provision I am now referring to is just put in there because of the attitude of the State commissions. It raises this question—it is not an important one, but technically an interesting one—whether if there is to be no corporation created as a result of a consolidation under this bill, and that you must have a State corporation as the resulting entity to take over the properties, there is any such thing as a true consolidation under the bill. In reality, the two methods of bringing about this unification, practically availed of and followed, will, in my judgment, be the method of acquisition and the method of merger; and, therefore, I am not concerned so much with the question of technical consolidation, although it is provided for in the bill.

Senator FESS. Colonel Thom, on page 6, line 24, there was a question raised by Commissioner Hall as to the word "lease."

Mr. THOM. I remember it. He said, "How can there be acquisition of securities by lease?"

Senator FESS. I wonder whether that term is necessary.

Mr. THOM. Perhaps not, but it is appropriate for this reason: Suppose that there was a lease to one carrier of the property and assets of another carrier, and suppose that other carrier had stock or securities in its treasury. Then the acquiring carrier would acquire those securities by lease, just as it would acquire the physical property by lease. It would acquire everything it had by lease, and a part of what passed under the lease would be securities. I do not think it hurts anything and I think it covers that point.

Senator FESS. The phrase "or otherwise" would probably take it in.

Mr. THOM. Yes. If there is any desire to strike it out, the words "or otherwise" would certainly cover it.

On page 7, in line 16, Mr. Commissioner Hall suggested that after the word "authorized" the words be inserted "and the carriers have executed." We have no objection to that.

Senator COUZENS. In connection with that paragraph, I see that the authority is left to the board of directors. Is it desirable to carry through in that language the same language you have in some others with respect to the consent of the stockholders?

Mr. THOM. No; the idea was that all preliminary work could be carried on by the board of directors, but that nothing could become final until the stockholders had acted, and, accordingly, it was not necessary to have more than one meeting of the stockholders. The board of directors were to attend to the preliminary matters, and this is a preliminary matter. In section 208 you will find that the assent of the stockholders is required before anything can be accomplished.

Mr. Hall also, on page 8, in line 13, suggested that the words "entered into" should be stricken out and the word "executed" should be substituted. We see no objection to that.

I have already commented on paragraph 2 of section 205, which paragraph is found on page 9.

On page 10, Mr. Hall seems to be in great doubt as to the use of the words "conditions precedent," in line 20. The old language for which this in italics is proposed as a substitute was:

> If the commission finds that the provisions of this title have been complied with, and is of the opinion, after such hearing, that the public interest in adequate and efficient transportation service and the policy of Congress herein declared will be promoted thereby.

There was a provision requiring the finding of the commission that the provisions of the title had been complied with and was broad enough, as mere language to include those requirements of the title which were to be complied with subsequently to the order. It was broad enough to cover all the provisions of the title, some of which were to be done before the order was entered and some of which were to be done after the order was entered. Now, to get rid of that inaccuracy, these words were suggested, "such of those provisions as were conditions precedent to the entry of the order," separating the conditions that must be complied with before the order is entered from the conditions that must be complied with after the order is entered. I see no difficulty in the use of those words. I think the act itself clearly points out what things must be done before the order is entered, and those things that must be done before the order is entered are conditions precedent. Nobody would have any difficulty in picking those out from the act. If, however, there is any difficulty on that subject at all, I suggest that it might be possible to change the italicized part here by making it read as follows:

> If, after such hearing, the commission is of the opinion that the proposed unification will be in accordance with the provisions of section 202, and finds that such provisions of this title as are conditions of the entry of the order have been complied with.

I do not think that changes it at all. I do not think that the words "conditions precedent" introduce a difficulty, but I lay the matter before you with that explanation.

Senator COUZENS. Following that language, after the language in italics, it says, "The commission shall enter an order." In view of the fact that you have eliminated these temporarily, the declaration of a policy by Congress, may that not better be worded "the commission may enter an order"?

Mr. THOM. I think what is now proposed is, from the standpoint of legal significance, just as strong a declaration of a policy as the former draft, because section 202 gives the authority that takes the place of a declaration of policy and makes limitations upon what is to be done to bring about the unification.

Senator WHEELER. Why should it not be discretionary?

Senator COUZENS. Yes. I think the word should be changed to "may," because you have eliminated the question of policy, and I think wisely, and leave it discretionary with the commission. I do not believe there should be any compulsory language in the bill with respect to the commission.

Mr. THOM. You do not think they should, if everything is done that Congress says ought to be done prior to consolidation, and they should so find, should be under an obligation to enter an order?

Senator COUZENS. Not definitely; no.

Senator PINE. Congress can not foresee all of the conditions.

Mr. THOM. We think the word "shall" is appropriate, and it has been in all of the drafts, but if the committee thinks otherwise, I do not think it makes much difference.

Senator COUZENS. We can discuss it in executive session, but I am personally opposed to the word "shall."

Mr. THOM. I do not think it is a very important matter; I mean from the standpoint I am advocating.

Senator WHEELER. If they find all these things, I do not think there is any doubt but what the commission would enter an order.

Mr. THOM. I do not think so. Therefore, it is a matter that I do not want to take up much time on.

Senator WHEELER. It is inconceivable that they would find all these things and then refuse to make an order.

Senator COUZENS. Referring again to page 10, I understand that the language in italics is supposed to take the place of the language just above it in section 207.

Mr. THOM. Yes, sir.

Senator COUZENS. In that event, you leave out any reference to the policy of Congress?

Mr. THOM. I did not quite understand that, Senator.

Senator COUZENS. I say the language in italics does not repeat the other language.

Mr. THOM. Because it now becomes inappropriate if there is no policy expressly to be declared. If you gentlemen think that this section 202, which gives authority for consolidation, should take the place of a declaration of policy, it would be inappropriate to have the word "policy" here repeated.

Senator COUZENS. That is what I mean. You left it out intentionally.

Mr. THOM. Yes, sir; intentionally, but in place of it we put in there "will be in accordance with the provisions of section 202."

Senator FESS. Colonel Thom, if we omit the word "precedent" on page 10, would we omit it on page 19, in line 5?

Mr. THOM. I think you could change it just as the other would be and make it read, "which are conditions of the entry of such an order," if there is any objection to the word "precedent." I like the word "precedent." I think that is a better expression of what we are seeking to express.

On page 12, beginning, in fact, in line 23 on page 11, Commissioner Hall suggested that that whole provision be omitted.

Senator WHEELER. What was that? I did not catch it.

Mr. THOM. I am referring now to page 11, line 23, and page 12 down to line 6. It is paragraph 2 of section 207. Mr. Hall suggested that it all be omitted.

Senator COUZENS. In view of the discussion that we had the other day concerning the language in italics on page 12, at the end of paragraph 2, it seems to me that might be quite proper.

Mr. THOM. You mean to omit it?

Senator COUZENS. Yes.

Mr. THOM. That was put in there, gentlemen, by the representatives of the short lines, and they considered a facility for the determination of these things if the commission would enter upon an investigation in respect to the short line situation throughout the country.

Senator FESS. The short lines' representative yesterday said that he would like to be heard on that.

Mr. THOM. I am not going to advocate its omission. I do not think the provision would be hurtful if the language in italics is retained, but there certainly should be no postponement of all consolidations until this general study of all short lines could be made. In any application there would be a special study of whatever short line problem was brought in connection with that consolidation. But I do not think, with that italicized expression in, there is going to be any serious difficulty about it.

Senator FESS. It has been the practice in all of our legislation, especially on new subjects, to make a provision for special studies on assembled facts of the matter that is involved in the legislation. That is the general custom. It is one of the things that is objectionable in building up bureaus.

Mr. THOM. Will the chairman of the committee allow me to go back to section 205 in order that I may make a suggestion which has been brought to my attention in a letter which I received yesterday? I see no objection at all to the adoption of the suggestion which I am now about to make, although I construe the language as it now exists as already covering it.

In section 205, the term "any carrier" authorized by the commission to acquire securities of another, or other carriers, as a step in unification, or to bring about a unification, is thought by some not to be broad enough to permit the commission to allow more than one carrier to jointly acquire such securities. The suggestion is that in line 17, after the word "carrier" the words "or carriers" should be inserted; "any carrier or carriers"; and in line 21, after the word "carrier" the words "or carriers" should be inserted. I think that, although it is in the singular, it means that now, but there may be cases where there is going to be an acquisition by the joint action of certain carriers of securities of another, and, if that should be considered to be in the public interest, the language ought to be certainly broad enough to cover it, and it would certainly be made broad enough to cover it by the suggestion which I have now made.

Senator FESS. We will consider that when we take up the amendments in executive session.

Mr. THOM. I was commenting upon the terms of the bill to be found on page 12. I now come to paragraph 4 on that page. Mr. Hall suggests that everything in line 13, after the word "shown," down to line 14 and line 15 down to the word "make" should be omitted.

Senator FESS. Not to include the word "make"?

Mr. THOM. Not to include the word "make." It now reads this way:

> The commission may from time to time, for good cause shown, upon the petition of a carrier (or of its successor in interest), which, under the plan, acquires the property of another carrier, make such orders, supplemental to any order issued under this title, as it may deem necessary or appropriate.

Mr. Hall's question is, Why limit that power to make supplemental orders by requiring that it shall be done only upon the petition of a carrier, which, under the plan, acquires property of another carrier?

The reason for the continuance of those words is that after a carrier acquires the property of another, then for the carrier whose property has been thus lawfully acquired to be able to come in by petition and upset the petition and ask for supplemental orders would be a very dangerous power to confer upon a carrier no longer interested. It ought to be confined to a carrier that has got the property and wants to perfect the arrangement, and in order to do so must come for some supplemental assistance. Consequently, that provision is deliberately put in there to keep parties who have no longer any interest in it from coming in and asking for supplemental orders and upset orders declared to be in the public interest. That is the reason for that.

On page 13, in line 20, Mr. Commissioner Hall suggests that after the word "meeting," which is at the end of the line, these words be inserted: "upon the question of the adoption of the plan as approved," so as to make it certain that you are not trying to affect the power of voting of any of the stockholders at this meeting on any question except upon the question of the adoption of the plan. I think that is what he means now, and I have no objection to the insertion.

Mr. Chairman, Senator Sackett has not arrived yet, has he?

Senator COUZENS. Well, we can go on.

Senator FESS. He told me that he would be here.

Senator COUZENS. If you desire to omit any part until Senator Sackett comes, omit it and then we can go back to it.

Mr. THOM. I merely wanted to explain a view of the law that I expressed yesterday. I will omit, then, page 15 for the present.

Going to page 18, Mr. Hall suggested that lines 23 and 24 be changed from the way they now read to read as follows: "The entry of an order by the commission under this title approving a plan," instead of "the entry of any order by the commission under this title." I think that is a very fair suggestion. That provision in paragraph 4 provides, if it is changed as suggested, for the entry of an order by the commission under this title approving a plan and that the certification by the commission, under section 209 shall be conclusive evidence that the carriers designated in such order, and their boards of directors and stockholders, have complied with the provisions of this title which are applicable to such carriers, boards of directors, and stockholders, and which are conditions precedent to the entry of such order and such certification.

His first criticism is the use of the words "conclusive evidence." We think there is a good deal of reason for the use of the word "conclusive." We are dealing with most important questions of title; we are dealing with situations in which investments will be made and in which large changes of property interests will be made. There will

be a reference by persons who propose to become interested in this to lawyers to find out whether the title is good.

Senator COUZENS. At that point may I suggest that if you put a period of limitations after which this might become conclusive, it might solve the objections raised by Mr. Hall.

Mr. THOM. I think it ought to become conclusive just like a judgment of a court becomes conclusive.

Senator WHEELER. The judgment of a court can be set aside, of course, for fraud.

Senator COUZENS. Yes; but the judgment of a court may be appealed when it is not conclusive. It seems to me that if you put in a certain period of time after which this would become conclusive, you would give those parties who might be interested a chance to intervene or make some appeal to the commission for a change in the record.

Mr. THOM. Well, let us see what has been done up to this point under the plan in this bill. There has been a meeting of the boards of directors of all those interested and they have agreed upon a plan, and they reduced that to writing and have all signed it. They have then come together to the commission and presented a petition asking for the approval of that plan. In doing that they have produced evidence that the directors did meet and did pass this resolution. The commission thereupon acts upon the application and grants it or modifies it and grants it in that way. Then, there is a requirement that the order as made by the commission shall go both to the meeting of the stockholders and to the meeting of the board of directors of each company, and that they shall pass upon it. When they have passed favorably upon it, each company is required to make a certificate of that fact to the Interstate Commerce Commission, and all will then have been done that are conditions precedent to the order going into effect, except a certificate by the Interstate Commerce Commission that these certificates have been filed with it. When this Interstate Commerce Commission certificate has been given, there is power to go on and consummate the consolidation.

Senator COUZENS. The objection that I would make to even all that procedure is the fact that this only has to be done by a majority of the stockholders. I can conceive of a minority stockholder, or a number of them, being absent in a foreign country, say, and unable to follow the proceedings, and all at once should realize that this transaction has been concluded, and that the order and everything is conclusive. It does seem to me that no harm could occur if there was a period after this were all consummated in which the minority stockholder, or other interested party, might come in, so that if before conclusive evidence a period of time lapsed when he might do that, I think he would be properly protected.

Mr. THOM. Well, gentlemen, I have to submit that question to the wisdom of the committee. I do not think that any harm would come from making it final at this time, because as I was about to say in response to Senator Wheeler's suggestion, there is no doubt about the fact that if there has been fraud practiced by the board of directors or by the stockholders, before third parties became interested or before vested rights are acquired, there would be a power to bring suit to set the order aside for fraud, notwithstanding the use of the word "conclusive."

Senator COUZENS. Yes; but, at the same time, the parties that you intended to protect, like the new investors that you spoke about, would be sufferers as a result of fraud just the same.

Mr. THOM. If this were conclusive they would be protected.

Senator COUZENS. Not after they made their investment, if, say, six months afterwards the fraud were discovered.

Mr. THOM. Well, that would be conclusive; when the third innocent parties come in no question of fraud can then be raised that affects their interests. They would be protected because they came in as purchasers for value and without notice of any fraud. But you are right in saying that, if an absent stockholder does not know anything about it, he would be cut off by the fact that all proceedings had taken place; and, consequently, I leave it, as I must leave it, of course, to the wisdom of the committee whether there should be a time put in before it becomes conclusive.

Senator COUZENS. Well, we can discuss that in executive session after we get through with the bill.

Mr. THOM. I want to emphasize the fact, however, that there ought to be a time when these things will be conclusive in the interest of stability of titles.

Senator COUZENS. I agree with you.

Senator WAGNER. The other day Commissioner Hall stated that the commission had the power now to reopen any proceeding upon which even a final order had been entered at any time; that there was no statute of limitations at all as to an application of that kind. Is that your understanding of the law?

Mr. THOM. That would be my understanding of the law unless you pass this bill as it is now written.

Senator WAGNER. Of course, this bill would change all that. That is, these conclusive findings would bar any such subsequent application as to the particular findings in that order, unless provision is made for it, would it not?

Mr. THOM. Yes, sir. I will ask you to turn to page 12, Senator, and to paragraph 4 on that page. If it is adopted as at present written, I think that would affect this general statute that Mr. Hall was referring to and would limit the supplemental order to one made upon the petitions there referred to. That was one of the objects of having this inserted. It was to get away from the uncertainty of a general power in the commission at any time, no matter what had taken place, to come in and make another order.

Senator WAGNER. What do you understand the law to be now, assuming that this is enacted giving the effect of conclusiveness to these findings? Suppose a minority stockholder saw that a mistake had been made in the findings. How can you get a court review of those proceedings?

Mr. THOM. He can not. His remedies would be to have his stock taken over and paid for at its value. That is the scheme of this bill.

Senator WAGNER. In view of that situation, is not Senator Couzens's suggestion a good one, that we have some statute of limitations after the entry of this order during which an application might be made to reopen or a review be made of some kind?

Mr. THOM. If you made that short enough not to be an obstacle in carrying these things out.

Senator WAGNER. What would you say would be a fair time limit?

Mr. THOM. I should say 30 or 60 days.

Senator WHEELER. That would not amount to anything.

Mr. THOM. Well, we have all got to consider this, gentlemen: What is the purpose of this bill? Is is to promote the public interest. If it does not do that, you gentlemen have no right to consider it at all. It is not a bill in any private interest. If you think it is, you can not pass it. You have got to come to the conclusion that the present policy as expressed in the law, that there should be proper consolidations, is a wise policy in the public interest. Now, once coming to that conclusion, you do not want to hamper the advantage which the public would gain by it by unneccessarily extending the time before it can take effect or in any other way. You want to create a method here by which the consolidation or merger method of promoting public interest will be with reasonable promptness carried into effect.

Senator WHEELER. Assuming that this is in the public interest—and I am not at all sure that it is myself—but assuming that it is, and we are passing it for the purpose of the public interest, then, of course, we ought not to ride rough shod over some individual's rights in doing it. That is the position that I take.

Mr. THOM. No; and then you have to consider in solving the problem which you now have in mind whether or not the requirement that the stock shall be bought at its value and paid for is sufficient protection for anybody that happens to be not in accord with the proposal. That is the remedy here provided, that there shall be an absolute obligation on the part of the acquiring carrier——

Senator WHEELER. Yes; but, Colonel Thom, if you will let me interrupt you for a moment——

Mr. THOM. Will you permit me to finish the sentence, because it will otherwise read just as if I had broken off in the middle of it? There is an absolute obligation on the part of the acquiring carrier to purchase or to condemn the stock of all dissatisfied stockholders as here defined, and that is made effective by permitting such a dissenting stockholder to institute the proceedings himself in the event that the carrier does not institute them. That is supposed to be always the satisfaction of anybody's rights in property if you pay the value of those rights to him.

Senator WHEELER. I was going to say this: First of all, you seldom find a law making anything conclusive evidence; and, secondly, if you make it conclusive, supposing the day afterwards the commission found that through some oversight or some mistake they had erroneously ended this thing; then you have made it conclusive and they could not go back and correct it.

Mr. THOM. You mean for any reason involving fraud or mistake, or just involving a question of whether or not they change their opinion?

Senator WHEELER. There might be some instance other than fraud. It might be a pure mistake. It would have to be a very substantial mistake in order for it to be set aside.

Mr. THOM. That might appear in the case of any court proceedings. Even in the case of the Supreme Court of the United States when a judgment becomes final the next day they may find they should have decided the case otherwise.

Senator WHEELER. Yes; but, as Senator Couzens has pointed out, they are only passing upon it after it has gone through at least two

other courts that have passed upon it and they have the value of the opinions of those courts; but here you are taking a court of first instance, if you want to call it that, and you are making their judgment final and conclusive. You do not do that with a district court. You do not do it with the circuit court of appeals, ordinarily. You do not do it with the criminal courts.

Senator COUZENS. In any event, in the Supreme Court there is oftentimes an application for a new hearing. Even that is not conclusive. But here it is entirely conclusive, according to the law.

Mr. THOM. When the court adjourns for the term it is conclusive, anyhow. However, the chairman raised the point. I have expressed myself in respect to it and you gentlemen are going to decide it, and if you see that there ought to be a proper period put in there before it becomes conclusive, you, of course, will do that. All I ask is that you do not make that so long that it will delay better service to the public.

Senator COUZENS. So long as this whole action is voluntary upon Congress, I do not think we need worry about a few months, because we are going to wait until the good will of the carrier has been developed before we get all of this benefit to the public.

Mr. THOM. Of course, it is our view that you would get a very much quicker result by this voluntary action than through any other method of treatment.

Senator COUZENS. I am just saying that there is no haste. If we postpone matters a few months, say, everybody would be properly protected.

Mr. THOM. I want to say in respect of that and not in opposition to your idea about having some time allowed, that my own belief is that if a method is here created which is workable for consolidations, you will be greatly surprised at the rapidity with which they will be consummated, for since 1920 the carriers have had the matter under consideration as to what they wanted to do, and a great many tendencies have been created toward the association of certain properties with others and a great many tentative plans undertaken. So I think it would be quicker than most people believe.

Senator COUZENS. I agree with you, but you have just mentioned that the carriers have taken nearly eight years to make up their minds that these consolidations would be in the public interest. If it has taken them nearly eight years to make up their minds that these consolidations were in the public interest, it certainly cannot hurt them very much if it takes a few weeks for a review.

Mr. THOM. You have overlooked, Mr. Chairman, the number of times that we have been before you on this matter. So when you say eight years, you must remember that the subject has been continually brought to the attention of Congress during those eight years.

Senator FESS. I suggest that we look into that matter later. We will have your testimony before us, Colonel Thom, and we will give it consideration as to whether we will make the change or not. I think it is quite an important suggestion.

Mr. THOM. On page 22 Mr. Hall suggested that after the word "creditors," in line 3, these words be inserted: "Except as provided in paragraph 5 of section 208."

Senator COUZENS. How would that make it read?

Mr. THOM. It would then read:

> In the case of any such corporate consolidation or merger, the rights of creditors except as provided in paragraph 5 of section 208, and all liens upon the property of any of the constituent or merging corporations shall be preserved unimpaired, etc.

The reason for that is that he thinks there is some conflict between the broad expression "rights of creditors shall be preserved," as now stated on page 22, when one of the rights of creditors may be taken away by paragraph 5 of section 208. That refers to the clause which I have for a moment passed over in respect to the bondholders.

Senator FESS. That is the one which you wanted to refer to when Senator Sackett is here?

Mr. THOM. Yes.

Senator COUZENS. Here is Senator Sackett now.

Mr. THOM. Senator Sackett, yesterday, you asked me a question which appears in the record in this way:

> Senator SACKETT. May I ask a question at this time? Consolidation takes place and a bondholder has a defaulted mortgage. The only relief of the bondholder is the sale of the property. How can that property be sold outside of the consolidation?

I gave an answer to that question which, upon reflection, I do not think was entirely correct. It is a very important question, and I think the answer should have been that the property could be sold outside of the consolidation under this bill. I was looking at it when I answered you from the standpoint of the power of Congress to provide otherwise and not as to what this bill proposes. The language which makes it absolutely certain, in my judgment, that it can be sold outside of the consolidation is to be found at the top of page 22 which preserves all the rights of creditors and all liens upon the property, and manifestly the rights of a creditor would not be preserved if his security had to be sold subject to a consolidation of his property with somebody else. That provision not only results in his being entirely protected, so far as he was originally, but added value would be given to his bond, because the sale of any property which underlies a large association, or lease or anything of that sort, brings necessarily an extra price because of the power that it gives to the purchaser to take it out of the combination.

Senator SACKETT. The point I had in mind was this: Perhaps I can state it better by an illustration than in any other way. Suppose the New York Central is in a consolidation and the West Shore is a party. There is a bondholder on the West Shore and a bond is defaulted on that. The foreclosure is run through and the property is offered for sale and it is purchased by the Pennsylvania System, newly consolidated. It seemed to me that it destroyed the purpose of consolidation which the Interstate Commerce Commission had already approved; that the West Shore should go into the New York Central consolidation and not into the Pennsylvania consolidation, and that if the Pennsylvania could not take it by reason of its purchase it limited the right of the bondholder to get the highest price for his property that he was entitled to.

Mr. THOM. Of course, you can not after this law is passed have one railroad buying another except subject to the commission's consent.

Senator SACKETT. Yes.

Mr. THOM. That ends that.

Senator SACKETT. That ends it.

Mr. THOM. But the cases where one railroad is the purchaser at a foreclosure sale of another are very rare. Moreover the whole of the field of purchase outside of some other railroad and the whole of the field of purchase by another road if permitted by the Commission is left. Manifestly, that is a big protection to the bondholder, to be able to sell his property so as to take it out of a consolidation, because there is every motive then on the part of the people who are in the consolidation to restore it to that place, and it has an added value. I answered your question impulsively yesterday and I wanted to correct what I thought might be thought an erroneous statement of law.

Now, coming back to the provision on page 15, which I omitted in consequence of desiring to wait for Senator Sackett to give that expression of opinion, we find there a provision which is intended to clear away the obstacle in the way of a unification that might be created by covenants in bonds. It is expressly negative there, that such a covenant in a bond, or in a mortgage, would give any right to the bondholder or to the trustee to stop this consolidation. He is left to his unimpaired rights in his security and to his lien. If the suggestion is adopted he will have no right to declare a default of his mortgage on account of what Congress has thought it best to do, and that covenant can not be resorted to in any way for the purpose of impeding consolidation. That is what is provided here.

Senator COUZENS. What other default did you have in mind when you said a trustee might develop a default other than a default on the interest on the bond?

Mr. THOM. Some of these mortgages might permit the trustee to declare a default for a breach of covenant, and here is a covenant that no consolidation shall take place without the consent of the trustee.

Senator COUZENS. I just wanted to reemphasize that.

Mr. THOM. Our very decided view is—it was not taken by us alone; it was after conference with some prople in public position—that Congress would never consent to permit the private contracts of the parties to be regulated to stand in the way of its exercise of the full power of regulation.

Senator SACKETT. This section is really declaratory of the law?

Mr. THOM. Yes; and when it is there you will avoid a great deal of litigation by having it expressed.

On page 25 Commissioner Hall called attention to paragraph 3, which is as follows:

> The opportunity to be heard by the commission and the right to secure just compensation for their stock, as afforded by this title, shall constitute the sole and exclusive remedies, in opposition to the plan, of stockholders of a carrier owning or possessing railroad or terminal property, etc.

His statement to the committee was that if that is to be construed as merely a declaration that such dissenting stockholder should not have power to prevent the plan going into effect, he had no quarrel with it, but that if it went farther and took away from a stockholder his private rights against the board of directors which he might think had wronged him, or against the majority of the stockholders which he might think had created a breach of trust in dealing with him, he did have objection to it; that he thought those private rights

ought not to be taken away. I think that is what it means now. I was asked the other day to say what we thought it meant, and I wanted to confer with some other gentlemen who were acquainted with this work before I made a committal on their behalf, but I have conferred and I think that is what it means as it stands.

I think, however, the words "in opposition to the plan," in line 15, could be made entirely clear by use of such language as this in the place of it: "in respect to the bringing about of a unification and carrying into effect the plan approved by the commission." In other words, we do not oppose the clarification of the section in the way that Mr. Commissioner Hall thinks desirable.

Senator SACKETT. Those are words of limitation?

Mr. THOM. Those are words of limitation.

Senator WAGNER. Will you repeat those words, please, Colonel?

Mr. THOM. Strike out in line 15 the words "in opposition to the plan" and insert in place of them, "in respect to the bringing about of a unification and carrying into effect the plan approved by the commission."

Senator COUZENS. May I ask you to revert to section 2 on that same page, and ask what the purpose of that clause is, to permit a carrier, or petitioning carrier, to withdraw from an application?

Mr. THOM. It is this: Of course, if the plan is pursued or carried out and there is a very large dissenting minority, the obligation which the carrying into effect of the plan would make definite on the carrier might be a very large and destructive one. If the minority were a very large one and the property were very valuable, it might involve a tremendous financial obligation to go through with the plan and to condemn all that dissenting stock. This is intended to allow the carrier, if there is dissent, to withdraw from the plan instead of carrying it out and not go on with the consolidation.

Senator COUZENS. I think not only does the point you make have weight but I also see possibilities here of a conspiracy, if you like, of stockjobbing. In other words, if the petitioning carrier had made his application and it looked apparent that the stock was going up because of this proposed consolidation, insiders may unload it on the public and then withdraw their application. I think it is very dangerous with respect to possibilities of stockjobbing to permit that sort of thing. I do not just at the moment see how it can be obviated, but it is a matter that ought to receive consideration.

Mr. THOM. I can see the point that the chairman makes. I do not think there is going to be much of that sort of thing when you consider that to withdraw the application you have got to get a majority and whatever is unloaded on the public would have to be bought with the understanding that this thing is going through unless the majority agrees to its withdrawal. I think the danger is thus reduced to a minimum. A little stockjobbing could not have the effect of causing the withdrawal. In order to withdraw it would have to be done by the majority and such action on the part of the majority would be a hard thing to get after they had gone into the large enterprise of bringing about such a consolidation which they would not be willing lightly to abandon. Only a very substantial reason could cause such action.

81538—28—PT 1——8

Senator COUZENS. Of course, to make the application you do not have to have the majority. The directors can make the application and get all of the publicity that goes with it and then withdraw from the application.

Mr. THOM. But this clause only covers the case where there is a dissenting stockholder and that can not be determined until after the stockholders' meeting and acceptance of the stockholders.

Senator COUZENS. That is rather a large question because you can easily have an arrangement to have a dissenting stockholder appear at any time after the damage is done.

Mr. THOM. This states that he shall be a dissenting stockholder.

Senator COUZENS. Yes; but the point that I am trying to make is that before stockholders are considered for a moment the directors may make application for the consolidation. Up to that time the stockholders have not been consulted at all. After this application has been made, publicity has been created. A paper increase in the value of the stock may have developed as a possibility of this consolidation. The insiders may have sold their stock because of the increased market price and afterwards withdraw their application and buy the stock back at a lower price than they sold it for because the application had been withdrawn. I think there is great danger there.

Mr. THOM. Of course, you appreciate that they can withdraw it anyhow up to the time it is passed on by the commission.

Senator COUZENS. Then, why this paragraph?

Mr. THOM. I would like to have Mr. Bledsoe, the general counsel for the Atchison, to state a view in regard to that that he has.

Mr. BLEDSOE. Mr. Chairman, my thought in connection with that provision was that there is a possibility that you have in mind, but a greater danger was in connection with the approval of the plan and then having a lot of the stock promoters go out and buy up a sufficient amount of the stock so that if you are compelled to take it it may seriously embarrass the ability of the carrier to carry forward the consolidation and even embarrass it in the discharge of its duties as a public servant after it is completed. In other words, the carrier in the acquisition of these same securities might be confronted with a much more disastrous consequence to the public by having the price run up on it beyond the price of so recent a time and it be compelled to take them perhaps on the basis of the market price, because it is more than likely that whatever determination of value attaches to the stock itself will be based on the market price. If that situation occurred, the detriment to the carrier and to the public, resulting from being extraneously priced because it is tied by having made the application, I think would be more disastrous than the other horn of the dilemma which you have discussed.

Senator COUZENS. Well, you admit that there is another horn of the dilemma?

Mr. BLEDSOE. Yes. I do not see how you can keep the matter of stock speculation out of a transaction of this kind. It, of course, ought to be minimized as far as it is possible to minimize it, and the carriers ought not to be burdened in carrying through a consolidation with any law that would make them become subject to the speculations in the market and be compelled to pay prices for the stock that might result from such speculation.

Senator COUZENS. It occurred to me that with respect to your statement you had the protection of the commission in permitting the financial set-up to protect you against having to pay these outrageous prices that might be created by speculators.

Mr. BLEDSOE. If we are not permitted to withdraw but are required to go forward, I do not see how the commission could protect us.

Senator COUZENS. The commission would not require you to go forward if in the opinion of the commission the stock were at an exorbitant price and necessitated the setting up of a financial plan which was not in the public interest.

Mr. BLEDSOE. That may be true.

Senator COUZENS. I think you have more protection, the railroad has more protection, in having to pay an exorbitant price for its stock than would accrue to the other horn of the dilemma to which I referred. However, we can discuss that in executive session of the committee.

Senator SACKETT. How far do you think the statement that the promoters have a right to withdraw acts as a notice to a purchaser in the open market, as the chairman refers to, that he may lose by making that speculation?

Mr. BLEDSOE. To the man who is well informed but who is not afraid of the stockholder, notwithstanding those things it would be, of course, a notice. To the man who lived in the country and simply bought on advice and on the appearance of the stock going up, it would afford no protection whatever; and that is the man who is really entitled to protection; he is not able to take care of himself in a manipulation of that kind.

Senator FESS. I was going to say that we ought wherever we can prevent the manipulation of interested parties at the expense of the public.

Senator COUZENS. The only question that arose in my mind was whether the application for withdrawal might be made in good faith. If there is any way of securing it being made in good faith I am for it.

Mr. BLEDSOE. I think the matter of the prevention of manipulation is very much in the public interest and in the interest of carrying forward the consolidations.

Mr. THOM. As the time is going by and I have one or two important considerations to present, I will pass over to page 32 and to page 33. I will first say in regard to section 218, on page 33, which begins in line 14 on that page and is headed "Separability of provisions," that I have come to doubt whether or not this is a proper bill to have the separability provision in. It is intended as one complete scheme. If any of it fails that is important enough for the court to say that it is a condition of the existence of the whole bill, it seems to me that the whole idea might be allowed to fall instead of having just some of it be permitted to remain in effect.

Senator COUZENS. I think you could devise language, though, that probably would not have the disastrous effect to which you refer.

Mr. THOM. I want to illustrate that, if I may. Suppose one of the important provisions of this law as to the power that here is undertaken to be conferred on State corporations were declared to be unconstitutional. I do not think it could be, but I am taking that as an illustration. Then you would not like to have what this bill now has in it, that all the balance of the act should stand, including

that part relating to paragraph 2 of section 5. So I doubt whether that is a good clause in this bill. I want also to make the suggestion that paragraph 2 of section 3, which is at the bottom of page 33, be omitted, and that paragraph 2 of section 5 of the present law be treated as is done in paragraph 2 at the bottom of page 32, which would leave it in effect but would permit the commission to require the proceedings for carrying it into effect to conform to the requirements of this bill.

The effect of paragraph 2 at the bottom of page 33 is merely to say that paragraph 2 of section 5 shall stand, but that no application shall hereafter be made under it. The proposal that I make is that that be omitted and that paragraph 2 of section 5 of the present act be allowed to stand, with the condition that the Commission may require any applicant under it to conform to the method of procedure provided by this bill.

I want at his point to file a brief, which I will call Exhibit No. 2, on the authority of Congress to confer power to consolidate upon State corporations engaged in interstate commerce. I will not take time to read it but will file it here for use if you see fit to use it. It is in two parts, one prepared by me and the other by Judge Lovett.

(The brief referred to will be found at the end of Mr. Thom's statement.)

Senator COUZENS. In regard to the separability of provisions, would you object to that being in there if, for example, the court should find that that section that we have just been discussing that the evidence shall be conclusive were declared to be invalid? You would not want the whole bill upset because of that, would you?

Mr. THOM. No; I think the court would determine that that was not such an important part of the bill as to destroy the balance of it.

Senator COUZENS. So you would be willing to leave it to the court to say whether or not the bill should be destroyed because of some part of it?

Mr. THOM. Yes.

Senator COUZENS. Before we adjourn I would like to ask the author of the bill if he is ready to go ahead with two or three witnesses to-morrow morning that want to come ahead of Colonel Thom?

Senator FESS. Colonel Thom, you have finished, have you?

Mr. THOM. Yes; unless there are some statements hereafter made to which I should want to reply.

Senator FESS. I believe the Senator from New York had some one coming to-morrow.

Senator WAGNER. A representative of the Port of New York Authority is to be here to-morrow. That is a public body, you understand.

Senator COUZENS. Will he be here to-morrow morning?

Senator WAGNER. Yes.

Senator COUZENS. Mr. Moore, of the Kansas City Southern, wants to be heard to-morrow.

Senator FESS. Mr. Williams is the man that Senator Hawes referred to as wanting to be heard to-morrow.

Senator COUZENS. Senator Watson made arrangements to have Mr. Moore of the Kansas City Southern heard to-morrow.

Mr. THOM. This letter that I have before me is from Mr. Moore and this suggestion which I have made is a suggestion that comes from him about "a carrier or carriers" in one of the sections here. There are two other suggestions that he made that I have not brought to your attention.

Senator FESS. It was Senator Hawes that wanted Mr. Williams to be heard to-morrow. I have no word as to whether he will be here or not.

Senator COUZENS. With whom is Mr. Williams connected?

Mr. THOM. The Missouri Pacific, the Wabash, and several other roads.

Senator FESS. On Saturday the Industrial League wants to be heard through Mr. Fullbright.

Senator SACKETT. Mr. Thom, I am anxious—and I am not speaking for myself alone but for myself and one or two others—before we take up this bill in executive session to have some prominent railroad executive operating man come before the committee and give satisfactory reasons why a consolidation problem should be met. What is to be gained by consoildation? We have heard your statement. What some of us are anxious to go into a little further is the value of consolidations from an operating standpoint.

Senator COUZENS. Did we not have that before in one of our hearings? Did not some of the operating heads come here and describe the value of consolidations?

Senator FESS. On the Cummins bill they did. We had elaborate hearings on that.

Senator SACKETT. That is a good while ago, and a good many questions have been raised recently as to whether consolidation is in the operating interest to any great extent, whether it is worth while.

Mr. THOM. You want to hear from some practical operating man?

Senator SACKETT. We want to hear what the operating side has to say.

Mr. THOM. I will try to bring that about, Senator.

Senator FESS. Mr. Chairman, the short-line people want to be heard. They are ready to be heard at any time. We will suit our convenience to them.

Mr. CAIN. The House committee will be conducting hearings next week and I presume it can be arranged so that my engagements will not conflict.

Senator FESS. We will not be holding hearings while the House committee is working. There was also a Boston man here yesterday.

Mr. THOM. Mr. Rich.

Senator FESS. Apparently he is not here now.

Mr. THOM. You were asking about a practical man. I do not know whether you would regard this gentleman that I am about to mention as coming within your definition, but Mr. A. H. Harris, a vice president of the New York Central, has been here discussing those questions and I could easily get him again.

Senator SACKETT. Is he in charge of operations?

Mr. THOM. No; he is not in charge of operations.

Senator COUZENS. Can you get Mr. Willard?

Mr. THOM. I can get some one.

Senator SACKETT. Just to sum up those things which maybe we have discussed before and maybe we have not.

Senator COUZENS. We will adjourn now until 10 o'clock to-morrow morning.

(The brief referred to by Mr. Thom is as follows:)

EXHIBIT No. 2

(Part 1. By Mr. Thom)

AUTHORITY OF CONGRESS TO CONFER POWER TO CONSOLIDATE UPON STATE CORPORATIONS ENGAGED IN INTERSTATE COMMERCE

The question now arises whether Congress can, under the Constitution, confer upon railroad corporations, chartered by a State and authorized by the State to engage in, and actually engaged in, interstate commerce, power to consolidate or merge with one another, when the State charter confers no such power, or when such consolidation or merger is contrary to the policy of the State, in respect to parallel or competing lines or otherwise, as reflected in the statutes or Constitution of the State.

Those who deny this power to Congress rely on expressions found in the cases, such as the following:

"In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

"If it be assumed that the States have no right to forbid the consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of State legislation—a proposition which only needs to be stated to demonstrate its unsoundness." (L. & N. Railroad *v.* Kentucky, 161 U. S. 702.)

or

"It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and to control their exercise of such powers." (L. & N. Railroad *v.* Kentucky, 183 U. S. 512.)

Before proceeding to discuss affirmatively the main question above stated, brief comment should be made on these cases.

The first of them (namely, that in 161 U. S.) was a case in which the Louisville & Nashville Railroad Co. undertook to acquire the control of and to operate certain other lines of railroad, alleged to be parallel and competing with its own lines, contrary to the Constitution and laws of Kentucky which forbade the consolidation or acquisition of parallel or competing lines.

Congress had not acted on the subject, and the validity of such action by Congress was not, and could not be, involved in the case. What the Supreme Court said, as set forth in the above quotations, was said merely by way of argument and was clearly obiter dictum, which, by universal concession, does not amount to judicial authority.

Indeed, part of what is there said by the court by way of argument, namely, that "the power to create and regulate the instruments of interstate commerce, so far as necessary to the conservation of the public interests, remains with the States," is directly contrary to the repeated decisions of the Supreme Court itself, upholding the power of Congress to create and regulate such instrumentalities. (McCulloch *v.* Maryland, 4 Wheat. 316, 411, 422; Osborne *v.* Bank of U. S., 9 Wheat. 738, 861, 873; Pacific Railroad Removal cases, 115 U. S. 1, 18; California *v.* Pacific Railroad, 127 U. S. 1, 39; Luxton *v.* North River Bridge Co., 153 U. S. 529; Wilson *v.* Shaw, 204 U. S. 34; Wisconsin R. R. Comm. *v.* C. B. & Q. R. R. Co., 257 U. S. 590.)

And the remainder of what is there said by the court by way of argument, namely, that it would follow from the assumption mentioned "that Congress would have the power to authorize such consolidation in defiance of State legislation—a proposition which only needs to be stated to demonstrate its unsoundness," is said by the court in apparent forgetfulness that one of the important railroads of the country, the Union Pacific, is the product of legislation by Congress bestowing upon a State corporation the power to consolidate, and that consolidation was challenged by the State of Kansas, the State afterwards abandoning its contention, as is hereinafter more fully shown.

The second of the cases from which quotation has been made supra (namely, that in 183 U. S.), involved the question of the validity of the statute and constitution of Kentucky in their relation to intrastate traffic, forbidding a charge, or the receipt, of greater compensation for the shorter than for the longer haul under certain conditions. No statute of Congress was involved nor any attempted exercise by Congress of a power to define the powers, or to control their exercise, of a railroad company incorporated by a State. Here, as in the case in 161 U. S., what was said by the Supreme Court was merely a loose expression, used arguendo, and was clearly obiter dictum only. It furnished no authority whatever. Indeed, the supreme authority of Congress over railroad corporations chartered by a State, in respect to their relative charges for the long and for the short haul in interstate commerce, has been so repeatedly exercised and so universally upheld by the Supreme Court that no citation of authority is necessary to sustain the legal proposition.

These cases forcibly illustrate the danger of relying on loose expressions of a court, used in argument, and on points not involved in the case.

Reverting now to the main question: So far as my examination of the authorities extends and so far as I am aware, no case can be found in the Supreme Court which, in the decision of the points involved, is adverse to the contention that it is within the constitutional authority of Congress to confer upon railroad corporations, chartered by a State and authorized by the State to engage in, and actually engaged in, interstate commerce, power to consolidate or merge with one another, when the State charter confers no such power and even where such consolidation or merger is contrary to the policy of the State as expressed in its statutes or Constitution.

The constitutional power of Congress to enact such legislation may be sustained under several separate clauses of the Constitution, but, as its power under the commerce clause is ample, the discussion here will be confined to its power to regulate interstate and foreign commerce.

THE COMMERCE POWER, STANDING ALONE, IS ADEQUATE TO SUPPORT SUCH LEGISLATION BY CONGRESS

The power of Congress to regulate interstate and foreign commerce is without limit, except the limit imposed by the fifth amendment to the Federal Constitution, which requires due process of law and forbids the taking of private property for public use without just compensation.

While this proposition of law is so well recognized as to require no citation of authority to establish it, for convenience the following cases may be cited: Gibbons *v.* Ogden, 9 Wheat. 1, 196, 197; Northern Securities Co. *v.* U. S., 193 U. S. 335–336; Minnesota Rate Case, 230 U. S. 399, 411; Houston & Texas Ry. Co. *v.* U. S., 234 U. S. 351; American Express Co. *v.* Caldwell, 244 U. S. 625; Ill. Cent. R. R. Co. *v.* Pub. Utilities Comm., 245 U. S. 506; Hammer *v.* Dagenhart, 247 U. S. 269; Wisconsin Rate Case, 257 U. S. 590.

In Gibbons *v.* Ogden, Chief Justice Marshall uses this language, which has never been departed from or questioned:

"The sovereignty of Congress, though limited to specific objects, is plenary as to those objects. The power over commerce with foreign nations and among the several States, is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

See also Lottery case, 188 U. S. 353.

In view of the extent and dominant character of the commerce power, and if provision for consolidation of carriers engaged in interstate commerce is legitimate exercise of the power of regulation, the question would appear not to admit of further debate. Under such circumstances, the conclusion would be inevitable that Congress has the power to confer upon the instrumentalities of interstate commerce authority to conform to its requirements as to the regulations it lawfully prescribes.

1. Let us therefore first consider whether provision for consolidation of carriers engaged in interstate commerce is a legitimate exercise of the power of regulation.

This does not seem to be doubtful.

It is, I believe, universally admitted that government ownership of such carriers may be acquired and government operation may be conducted under the commerce clause of the Constitution. This is an extreme form of consolidation, and, if this could be done under the commerce clause as a legitimate exercise of the power of regulation, anything less than this extreme would seem also to be a legitimate exercise of the power of regulation.

In view of the unifying commercial forces, affecting transportation, brought into play by steam, by gasoline, and by electricity (including telegraph, telephone, and radio), Congress may conclude that the public can no longer be adequately served by a very large number of disjointed railroads, differently and independently managed and operated, difficult to coordinate to the extent that the movement of commercial traffic may require; that systematic, instead of haphazard and uncertain, coordination is necessary; that a system of better, more dependable, and more harmonious cooperation in the operation of the instrumentalities of commerce is needed in the public interest; that this important object will be promoted by fewer systems of roads; and that the best means of accomplishing this is through consolidation. Congress may likewise conclude that the problem of preserving weak roads, rendering an important service to the public, is a problem of national significance and can be dealt with and at least favorably and substantially influenced, and perhaps solved, by consolidation.

Again, as related to the "weak road problem," there are two schools of thought in respect to prescribing divisions of joint rates with reference to the financial needs, instead of the relative service, of the participating carriers, and in respect to the present system of rate making, whereby certain shippers, not served by a weak line, are charged more than they should be, if the direct service they enjoy is alone considered, in order to support weak lines on which they are not directly dependent for service, and whereby the excess thus paid does not go back to the shippers that have overpaid, but to the Government. One of these schools of thought endorses the view that the division of rates should be made with reference to the financial needs of, and in order to support, the weak lines, while the other rejects this view and contends that the result is to take from a carrier that which it earns for a service which it performs and to give it to another which has not performed the service, simply because it needs it. One of these schools of thought endorses the present system of rate making, while the other believes that a method should be devised whereby no shipper should be charged more than is proper for the service which he directly receives and no carrier should be deprived of any part of the revenue which it earns from reasonable rates.

Congress may, under the decisions of the Supreme Court, adopt either of these views. If it adopts the latter view, it may reasonably conclude that the difficulty may be solved or that the proper remedy will be at least promoted by a policy of consolidation.

It can not be denied that to reach a conclusion by Congress on any one or all of the four aspects of interstate transportation above suggested is within the constitutional power of Congress, and its conclusions, when reached, can not be considered as arbitrary and are beyond challenge in the courts or elsewhere.

2. The discretion of Congress as to the selection of means to carry out its constitutional powers.

It has been firmly established, every since Chief Justice Marshall's time, that a sound construction of the Constitution allows to Congress a large discretion with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people, and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, are consitutional." (Gibbons *v.* Ogden, 9 Wheat. 1, 196, 197; Northern Securities Co. *v.* U. S., 193 U. S. 336, and cases there cited.)

"In the great case of McCulloch *v.* Maryland, 4 Wheat. 316, 421, 423, it was said:

" 'The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.'

"Interstate Commerce Commission *v.* Brimson, 154 U. S. 472." Ruddy *v.* Rossi, 248 U. S. 107.

If, as above stated, Congress concludes that the consolidation of the existing systems of railroad is a proper means of accomplishing its constitutional purposes, its conclusion can not be sucessfully challenged.

3. The power of regulation extends not only to the methods by which interstate commerce is carried on, but also to the physical instrumentalities of such commerce.

"The power" (to regulate interstate and foreign commerce) "also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged." (Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 204.)

"Its power extends to every instrumentality or agency by which it is carried on." (Wisconsin Rate case, 257 U. S. 589.)

Thus the entire instrumentality of interstate commerce is within the regulating power of Congress and when exercised the regulation is controlling and exclusive. (Minnesota Rate case, 230 U. S. 411; Houston & Texas Ry. Co. *v.* U. S., 234 U. S. 351, Hammer *v.* Dagenhart, 247 U. S. 269; Wisconsin Rate case, 257 U. S. 589.)

4. The power to regulate is a power to "aid and encourage," to "foster and protect," as well as to "control and restrain." (Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 204; Houston & Texas Ry. Co. *v.* U. S., 234 U. S. 351.)

Congress, under its power to regulate commerce, may make the interstate commerce system, including the instrumentalities of such commerce, "adequate to the needs of the country." (Wisconsin Rate case, 257 U. S. 589.)

It would seem to be beyond question, in the exercise of the power of Congress over the instrumentalities of interstate commerce (Wisconsin Rate case, 257 U. S. 589), of its broad discretion to "select the means" by which its constitutional powers may be carried out (McCulloch *v.* Maryland, 4 Wheat. 423), in the exercise of its power "to aid and encourage" (Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 204), "to foster and protect" (Houston & Texas Ry. Co. *v.* U. S., 234 U. S. 351), and "to make the instrumentalities of such commerce adequate to the needs of the country" (Wisconsin Rate case, 257 U. S. 589), and in view of the reasonable relation, as above shown, of consolidation to the power of regulation, Congress may deal with, regulate, and confer the power of consolidation on these instrumentalities, if it may confer the power upon corporations chartered by a State.

5. Inasmuch as exercise of the power involves the conferring by Congress upon State corporations of additional franchises, it is appropriate to consider whether Congress has this power. That it has, is abundantly established by repeated decisions of the Supreme Court of the United States. (California *v.* Pacific Ry. Co., 127 U. S. 1; 39; United States *v.* Stanford, 161 U. S. 412, 433; Southern Pacific R. R. Co. *v.* U. S., 183 U. S. 519, 527.)

In the case of the Southern Pacific Railroad Company *v.* United States, 183 U. S., page 527, it is said:

"It is well settled that Congress has power to grant to a corporation created by a State additional franchises—at least franchises of a similar nature."

That, of course, is to say that the franchises granted to a transportation corporation must be with respect to commerce and transportation.

"Congress has frequently conferred upon railway companies, existing under Territorial or State laws, additional corporate franchises, rights, and privileges, and its right to do so can not be doubted. Thus it was held, in California *v.* Pacific Railroad Co., 127 U. S. 1, 39, that Congress possessed and validly exercised the power to create a system of railroads connecting the east with the Pacific Coast, traversing States as well as Territories, and to employ the agency of State as well as Federal corporations." (Oregon Short Line Railway *v.* Skottowe, 162 U. S. 494.)

It has exercised the power of limiting franchises granted by a State to a transportation corporation created by it, in almost every essential particular—in the making of rates, in the character of equipment, in the character of service, in the matter of safety, in the keeping of accounts, in the division of revenues, in the limiting of revenues, and in the issuing of securities. The Supreme Court has upheld this exercise of power wherever it has been questioned.

This authority to control the powers of a State corporation has not been exercised by Congress merely in the direction of restriction or limitation. It has been exercised to confer additional affirmative powers of the most fundamental and substantial character upon State corporations.

In California *v.* Pacific Railroad Co., 127 U. S. 1, the power was conferred upon a State corporation to extend its construction beyond the limits permitted in the State charter.

By the act of March 3, 1865, Congress conferred upon the Central Pacific Railroad Co., a State corporation, and the Western Pacific Railroad Co., a State corporation, in addition to their powers under their State charters, power to issue "their 6 per cent 30-year bonds" to a very large amount in the aggregate, and also conferred upon them other franchises. This exercise of power was men-

tioned with evident approval and without question by the Supreme Court of the United States in the case of United States *v.* Stanford, 161 U. S. 426.

6. In fact, Congress, in order to carry out a national object, constitutionally within its power, may employ any agency it sees fit. It may employ the agency of a State corporation as well as a Federal corporation. (Wilson *v.* Shaw, 204 U. S. 34; Pacific Railroad Removal cases, 115 U. S. 1, 14, 18; California *v.* Pacific R. R. Co., 127 U. S. 39; United States *v.* Stanford, 161 U. S. 433.)

An important memorandum on the subject of the powers of Congress under the commerce clause of the Constitution was prepared in November, 1916—not long before his death—by the Hon. Richard Olney, Attorney General and Secretary of State in Mr. Cleveland's cabinet. A part of it is pertinent here and is respectfully presented for consideration.

"1. For all the purposes and functions of commerce between the States of the United States, between such States and Territories of the United States, and between such States and Territories on the one hand and foreign nations on the other, the United States is one country, with complete and exclusive jurisdiction over the whole subject—and State lines and jurisdictions are without significance.

"2. Commerce, in the constitutional sense, covers transportation and intercourse in all forms and whether existing when the Constitution was adopted or since introduced and practiced.

"3. The national commerce power, being of such extent and exclusiveness, necessarily subjects to national regulation and control all the agencies and instrumentalities by which national commerce is carried on.

"4. It can not be doubted that a railroad corporation created by a national charter is an apt instrument for the carrying on of national transportation and that the organization of such a corporation with all appropriate powers and duties is a fit subject for treatment under the commerce power."

From the foregoing it will be seen that Congress, in the exercise of its power under the commerce clause, may itself create a corporation and endow it with all necessary powers as a means of regulating commerce; that, instead of itself creating such a corporation, it may avail itself of the agency of a corporation already created by a State and endow it with the necessary powers deemed by Congress essential to the carrying on and regulation of commerce.

7. The State itself can not complain of this power. It chartered a corporation and authorized it to engage in interstate commerce. By this act it consented in advance to subject it to the full exercise of the powers of Congress in the regulation of commerce. One of these powers is shown by authority to be to grant to the State corporation additional franchises for the purpose of promoting the interstate commerce for which the State corporation was organized.

Inasmuch as the additional franchise is a matter of regulation of interstate commerce, this regulation stands just as any other valid regulation by Congress and is beyond the power of the State to modify, to take away, or to question. The corporation still remains a corporation of the State and subject to its power, except that it can not affect this franchise, which, as stated, is a valid regulation by Congress of interstate commerce, and, as held in California *v.* Pacific Railroad Co., supra, "can not be taken away nor destroyed nor abridged nor can they be crippled by onerous burdens."

8. It is interesting to note that one of the largest and most useful systems of railroad transportation on the continent—the Union Pacific—is the product of the exercise by Congress of the authority to confer upon a State railroad corporation the corporate power to consolidate with another railroad corporation. In this case the Leavenworth, Pawnee & Western Railroad Co. was incorporated by the Legislature of the Territory of Kansas in 1855. In 1861 the Territory of Kansas became a State. In 1862 Congress authorized this corporation, which was then a corporation of the State of Kansas, to consolidate with the Union Pacific.

The Leavenworth, Pawnee & Western Railroad Co. accepted the provisions of this act of Congress and was thereafter designated as the Union Pacific Railroad Co., Eastern Division. In 1864 Congress passed another act with reference to the route of that road and made provision likewise for the consolidation of any two or more corporations embraced in the system. In 1866 Congress passed an act authorizing the above-mentioned company to make its connection with the Union Pacific at a designated point; and by another act in 1869 the company was authorized to extend its road to Denver and was given other powers. On the same day Congress passed a Joint Resolution authorizing this company, under the name of the Union Pacific Railroad Co.,

Eastern Division, by a resolution of its directors, to change its name to the Kansas Pacific Railway Co.

On the 24th of January, 1880, the Union Pacific Railroad Co., the Kansas Pacific Railway Co., and the Denver Pacific Railway & Telegraph Co., acting under the authority of the act of Congress of 1862 and of the act of Congress of 1864, entered into an agreement for the consolidation of the three corporations into one, by the name of the Union Pacific Railway Co., and, as stated by the Supreme Court, "from that time the road of the Kansas Pacific Co., including that portion which lies in Kansas, has been operated and managed as the Kansas Division of the Union Pacific Railway Co."

At the first session of the Legislature of Kansas after this consolidation was effected, a resolution was passed directing the Attorney General to inquire into its validity, and subsequently, at another session of the Kansas Legislature, the Attorney General was, by a resolution, directed to institute proper proceedings in the supreme court of that State by way of quo warranto to challenge the legality of the consolidation of this State corporation with the Union Pacific under the authority of an act of Congress.

A motion to remove to the United States court was made and was denied, and thereupon the case was taken to the Supreme Court of the United States to test the question of its removability to the Federal courts. The Supreme Court decided that the case was removable because the Federal question of the validity of the act of Congress authorizing the consolidation was involved, and in Ames *v.* Kansas, 111 U. S. 449, the right to remove was upheld and the case remanded to the lower Federal court for further proceedings.

After the return of the case and after the circuit court was directed to entertain the case as properly removed from the State court and to proceed accordingly, the State of Kansas abandoned its attack upon the validity of the consolidation.

The Union Pacific is thus to-day made up in part of the property of the Kansas Pacific Railway Co., which it acquired under the authority of Congress authorizing the State corporation to consolidate with it.

It is submitted that the result of the foregoing discussion is to uphold the power of Congress to authorize State corporations engaged in interstate and foreign commerce to consolidate under such terms as Congress may prescribe.

(Part 2. Memorandum by Judge Lovett)

NOTE.—At the conclusion of my testimony the chairman and several members of the committee requested that I add to the record of my testimony references to cases in the Supreme Court which I regarded as supporting the views I had expressed respecting the powers of Congress, and I accordingly append the following:

1. That Congress is free to utilize State corporations and endow them with corporate powers in addition to those granted by the State is shown by California *v.* Central Pacific R. R. Co. (127 U. S. 1). That case concerned the right of the State to tax franchises granted by Congress to a State corporation. The Central Pacific Railroad Co. of California had been organized under the laws of California to construct and operate a railroad from Sacramento to the eastern boundary of the State. Thereafter by the first of the Pacific Railroad acts (12 Stats. 489) Congress authorized the construction of a line of railroad from the Missouri River to the Pacific Ocean, and by section 9 thereof provided that "The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions in all respects as are contained in this act for the construction of said railroad and telegraph line first mentioned," etc. By amendatory act (13 Stats. 356) the Central Pacific Railroad Co. of California was authorized to continue its road eastward until it should meet and connect with the Union Pacific Railroad. The Supreme Court said (127 U. S. at page 39):

"It can not at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State is essential to the complete control and regulation of interstate commerce. * * * Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the

wider power was very freely exercised, and much to the general satisfaction in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations." The opinion in United States *v.* Stanford (161 U. S. at p. 433), commenting on California *v.* Pacific Railroad Co., said: "The relations between the California corporation and the State were of no concern to the National Government at the time the purpose was formed to establish a great highway across the continent for governmental and public use. Congress chose this existing artificial being as an instrumentality to accomplish national ends, and the relations between the United States and that corporation ought to be determined by the enactments which established those relations." In Oregon Short Line *v.* Skottowe (162 U. S. at p. 494) it was said: "Congress has frequently conferred upon railway companies, existing under Territorial or State laws, additional corporate franchises, rights, and privileges, and its right to do so can not be doubted." See also Wilson *v.* Shaw (204 U. S. 24).

2. The commerce clause confers upon Congress complete power in the regulation of Interstate commerce, limited only by other provisions of the Constitution itself. Thus, Chief Justice Marshall, in Gibbons *v.* Ogden (9 Wheat.), said at page 196, referring to the power to regulate interstate commerce: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." Again, in Brown *v.* Maryland (12 Wheat.), Chief Justice Marshall, considering the extent of the power to regulate commerce, said at page 446: "This question was considered in the case of Gibbons *v.* Ogden (9 Wheat. 1), in which it was declared to be complete in itself and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts and can not be stopped at the external boundary of a State, but must enter its interior."

3. The power to regulate interstate commerce extends not merely to the commerce itself but to all the agencies and instrumentalities employed in or appropriate to use in such commerce. Mr. Justice Field said, in Gloucester Ferry Co. *v.* Pennsylvania (114 U. S. at p. 204): "The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged. The subjects therefore upon which the power may be exerted are of infinite variety." And in Wilson *v.* New (the Adamson Act case, 243 U. S.), Chief Justice White said at page 349: "That the power to regulate also extends to many phases of the business of carriage and embraces the right to control the contract power of a carrier in so far as the public interest requires such limitation has also been manifested by repeated acts of legislation as to bills of lading, tariffs, and many other things too numerous to mention. Equally certain is it that the power has been exercised so as to deal not only with the carrier, but with its servants and to regulate the relation of such servants not only with their employers but between themselves. Illustrations of the latter are afforded by the hours of service act, the safety appliance act, and the employers' liability act." See also United States *v.* Ferger (250 U. S. at p. 203).

4. In the exercise of its power to regulate interstate commerce Congress is free to choose such methods and select such agencies as it deems best adapted to the purpose. This is illustrated by the cases above cited concerning Federal grants of power and authority to State corporations. The following references state the proposition in its broadest aspect: Chief Justice Marshall in M'Culloch *v.* Maryland (4 Wheat. at p. 421) said: "We think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." See also Interstate Commerce Commission *v.* Brimson (154 U. S. 447, 472); Ruddy *v.* Rossi (248 U. S. 104, 107).

5. The power to regulate interstate commerce is paramount to any power possessed by the States and any State interference is invalid whether by legislative act, municipal ordinance, executive order, or constitutional provision. It was said in the Minnesota Rate Case (230 U. S. at p. 399): "This reservation (as to internal commerce) to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room

in our scheme of government for the assertion of State power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In Wisconsin Railroad Commission *v.* C., B. & Q. R. R. Co. (257 U. S.), Chief Justice Taft said at page 590: "Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing State work. The affirmative power of Congress in developing interstate commerce agencies is clear. * * * In such development it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field." In Leisy *v.* Hardin (135 U. S. at p. 108), it was said: "And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action." In Oregon-Washington Railroad & Navigation Co. *v.* Washington, decided March 1, 1926, not yet reported, an embargo of the director of agriculture of the State of Washington, acting under the authority of a State statute, against the transportation into Washington of alfalfa hay from certain sections of other States believed to be infected with alfalfa weevil, was held invalid on the ground that the Federal Secretary of Agriculture is invested by Federal statute with power as to quarantine in interstate commerce and that Congress has, therefore, assumed control of the whole subject matter. Chief Justice Taft said: "In the relation of the States to the regulation of interstate commerce by Congress there are two fields. There is one in which the State can not interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the State's police power brings it into contact with interstate commerce so as to affect that commerce, the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded State action."

In Colorado *v.* U. S., decided May 3, 1926, and not yet reported, the State complained of an order of the Interstate Commerce Commission authorizing the abandonment of a branch line of the Colorado & Southern, a corporation of that State, arguing that the charter of that corporation was a contract with the State by which the company assumed the obligation of providing intrastate service, that the extent and character of the intrastate service was the subject of regulation by the State and that the Interstate Commerce Commission could not relieve the corporation of its primary duty to furnish intrastate service. This argument was rejected by the Supreme Court, which held that the performance of unprofitable intrastate transportation service might deplete the resources of the corporation to the prejudice of interstate commerce and that Congress has the power to control intrastate commerce as a necessary incident of freeing interstate commerce from unnecessary burdens, obstructions, or unjust discrimination. The court said: "Because the same instrumentalities serve both, Congress has power to assume not only some control but paramount control in so far as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that the interstate service may be adequately rendered." See also the recent decisions holding invalid as a burden upon interstate commerce the State laws permitting suits against foreign railroad corporations not owning or operating railroads within the State by plaintiffs not residing therein upon causes of action arising elsewhere. (Davis, Director General *v.* Farmers Cooperative Equity Co., 262 U. S. 312; Atchison, Topeka & Santa Fe Ry. Co. *v.* Wells, 265 U. S. 101.) A provision in the constitution of a State which conflicts with the Federal Constitution is

invalid equally with an act of the legislature of the State so conflicting. (R. R. Co. *v.* McClure, 10 Wall. at p. 515; White *v.* Hart, 13 Wall. at p. 652; Cooley's Constitutional Limitations, 7th Ed., at p. 62.)

6. A railroad is private property. (I. C. C. *v.* Chicago Great Western, 209 U. S. at p. 118; Northern Pacific Ry. *v.* North Dakota, 236 U. S. at p. 595; Great Northern Ry. *v.* Minnesota, 238 U. S. at p. 346.)

R. S. LOVETT.

(Whereupon, at 12 o'clock noon, the committee adjourned to 10 o'clock a. m., Friday, January 13, 1928.)

CONSOLIDATION OF RAILWAY PROPERTIES

FRIDAY, JANUARY 13, 1928

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10 o'clock a. m., in the committee room, Capitol, Hon. James Couzens presiding.

Present: Senators Couzens and Fess.

Senator COUZENS (presiding). The committee will please come to order. We will hear first this morning the representative of the Port Authority of New York.

STATEMENT OF WILBUR LA ROE, JR., ASSOCIATE COUNSEL FOR THE PORT OF NEW YORK AUTHORITY, TRANSPORTATION BUILDING, WASHINGTON, D. C.

Senator COUZENS. Please give your name and state whom you represent, Mr. La Roe.

Mr. LA ROE. My name is Wilbur La Roe, jr., associate counsel for the Port of New York Authority, Transportation Building, Washington, D. C.

My statement will be very brief and will take only six or seven minutes.

The Port of New York Authority was created by joint action of the States of New York and New Jersey and is engaged in carrying out and effectuating a statutory plan, approved by the two States and by Congress, for the coordination and unification of terminal facilities at the port of New York. It is vitally interested, for reasons which I shall endeavor to make clear, in one aspect of the consolidation problem.

It has long been recognized by those familiar with New York's terminal problem that its solution is impossible without a better coordination of the various belt lines and other terminal facilities within the port district. More than 10 years ago the Interstate Commerce Commission said in its decision in the New York Harbor case (47 I. C. C. 643):

> It is necessary that the great terminals at the port of New York be made practically one, and that the separate interests of the individual carriers, so long an insuperable obstacle to any constructive plan of terminal development, be subordinated to the public interest.

One of the principles underlying the statutory plan to which I have referred reads as follows:

> That terminal operations within the port district, so far as economically practicable, should be unified.

The port authority has already made considerable progress in the direction of terminal unification. New York and New Jersey are being linked together by two modern vehicular bridges which will be completed this year and two more bridges, one of them the largest in the world, will be completed in about four years. The cost of these bridges will total about $94,000,000. A line of railroad running along the west bank of the North River, almost ideal for use as a belt line because it linked together practically all the railroad terminals on the New Jersey shore, was not functioning as a belt line because various portions of it were owned by different railroads. The port authority has brought about its unification. An elaborate study of lighterage and carfloat operations has been made to lay a foundation for the unified operation of floating equipment valued at roughly $30,000,000. Considerable progress has been made in the direction of providing inland union freight terminals on Manhattan Island to relieve the congested waterfront. Proceedings have been instituted to obtain for Long Island shippers the benefit of an all-rail route to and from the west, now denied them because the Pennsylvania Railroad refuses to let New York Central traffic use the Hell Gate Bridge.

In other words, there is a perfectly good all-rail route from Long Island to the West already available over Hell Gate bridge, but the Pennsylvania Railroad, which is one of the owners of that bridge, will not let the New York Central traffic go over the bridge.

An elaborate study has been made of terminal trucking and of the better coordination of truck service and rail service.

I give this kaleidoscopic and inadequate survey of the port authority's work only for the purpose of impressing upon you the importance of terminal unification. The port authority appeared before this committee when the Cummins bill was under consideration, and I think it was partly as a result of our efforts that there was included in that bill the following, which does not appear in the present bill, and to which we call your attention:

(21) The commission may in its plan, to such extent as it finds the public interest requires—

(*a*) Provide for the omission from the system of any terminal railway properties (including main-line tracks for a reasonable distance outside the terminal) or of any lines affiliated with the lines of Canadian companies, or of any other properties.

(*b*) Provide for the inclusion of any such railway properties in any one of the systems but subject to common use.

(*c*) Provide for the common use of any railway properties so omitted or included, upon such conditions as the commission determines will insure such common use in the public interest.

(*d*) Provide for the extension or enlargement of any railway properties so omitted or included, or for the abandonment of any railway properties so omitted.

(This is set out on page 16 of Mr. Cummins's bill, S. 3840.) I hand you copy of a similar provision which we suggest be included in the present bill, S. 1175, in section 207, reading as follows:

The commission may to such extent as it finds the public interest requires—

(1) Provide for the omission from any system of any terminal railway properties, including main-line tracks for a reasonable distance outside the terminal.

(2) Provide for the inclusion of any such terminal railway properties in any system but subject to joint or common use.

(3) Provide for the joint or common use of any railway properties so omitted or included, upon such conditions as the commission determines will insure such common use in the public interest.

If I may, I will dwell for just a moment on that Central of New Jersey illustration. Suppose that the Central Railroad of New Jersey were awarded to the Nickel Plate system, so that the Nickel Plate system would own the Central Railroad and its terminals. What would happen to the Baltimore & Ohio Railroad and to the Lehigh Valley Railroad and to the Reading Railroad, which, to a certain extent, may already have the use of those terminals? My whole point is that the future trend ought to be in the direction of common ownership of such facilities rather than in the opposite direction.

The St. Louis situation is a good illustration of joint terminal use. There the railroads have voluntarily created the Terminal Railroad Association and all the carriers have access to its valuable terminals. No carrier has a terminal monopoly. The terminal problem encountered in so many cities will never be solved so long as the terminal development is left to the rivalry of individual railroads. "It is this rivalry" said the Interstate Commerce Commission in the New York Harbor case, "that tempts the carriers to invest large sums in new terminals for their individual use instead of uniting in a common effort to solve in a larger way a problem whose solution can never be attained so long as the present policy of unrestrained competition is continued."

This subject is discussed by Professor Ripley in his consolidation report, and he concludes that "whatever the means adopted to this end, it is submitted that a proper adjustment of the various terminal situations, always of course for due consideration, is an important adjunct to any comprehensive consolidation plan."

We are convinced that this is so, and that is the sole reason for our appearance before you. That concludes my statement.

Mr. THOM. May I ask a question, Mr. Chairman?

Senator COUZENS. Certainly.

Mr. THOM. Do you not think that all you have asked to have expressed in this bill is already included in the power to the commission to attach such conditions as it seems proper to any application? That is intended to be broad enough to cover all of this and anything else.

Mr. LA ROE. Judge Thom, you know that the commission is always accused by the railroads and others of judicial legislation and of going outside the specific scope of its authority. An administrative body like the commission, operating under congressional direction and as an agent of Congress, ought not, in my judgment, to attach conditions involving important principles without the approval of Congress; or, at least, I will state it the other way around, that if there is an important principle involving our national transportation system, so important that it amounts to a Federal policy, I think it much sounder for Congress to declare such a policy than for the commission to inaugurate it.

Mr. THOM. I was not asking as to the wisdom of the expression, I was asking for your interpretation of this power in section 207 for the commission to attach any condition it sees fit in the public interest to any application for consolidation. Is not that broad enough for it to attach a condition for the joint use of properties? Is it not broad enough to embrace all the powers you are now asking for?

81538—28—PT 1——9

Mr. La Roe. It is possible that it might be so construed, but I see no objection to making it more specific concerning this national principle.

Mr. Thom. I am trying to get your judgment as a lawyer as to whether the bill is not already broad enough to include it, and I understand you to say that it is?

Mr. La Roe. I think it might be so construed.

Senator Couzens. You can see no objection, Colonel Thom, can you, to putting that specific language in there?

Mr. Thom. I can see no objection to putting in some language that would make this expressive, if it is considered important. I am not prepared to accept this without further study.

Senator Fess. It has been one of the objects of unification as enumerated that we want to accomplish and facilitate, as much as possible, the common use of terminals where it is in the interest of the public, and I thought we had it in here.

Mr. La Roe. If I may say so, I do not see why such a carefully prepared provision already incorporated in the Cummins bill, after it had been given the most earnest consideration by Senator Cummins, should be excluded from this bill. As it is a question of national importance, we earnestly hope that you will not leave it to inference that the broad word "conditions" used in the present draft is adequate to amount to a declaration of national policy on such an important issue.

Senator Fess. One idea in the signing of this bill was to make the sanction broad enough, without going into specific references in detail, that if we could confer power in one authority, without specifying this or that, it would be better. That was the theory of the bill.

Mr. La Roe. In spite of Colonel Thom's point about the bill already being adequate, we greatly fear that if we should appear before the commission in a consolidation program trying to get such an important terminal as the Central Railroad of New Jersey—and I use that only for illustration—away from a system to which it was awarded, our railroad friends might be the very first to argue that you can read your bill through from one end to the other and not find a reference to terminal problems.

Senator Couzens. I agree with the witness, because one of the greatest factors relates to terminal facilities.

Senator Fess. We will consider that, Mr. La Roe.

Mr. La Roe. Thank you, Senator.

Senator Couzens. Is the gentleman here from the Kansas City Southern who wishes to be heard?

STATEMENT OF SAMUEL W. MOORE, COUNSEL FOR THE KANSAS CITY SOUTHERN RAILWAY CO.

Mr. Moore. Mr. Chairman, I desire to make very briefly certain suggestions for the consideration of the committee. The first one is in reference to section 203 on page 4. The bill as it reads provides in paragraph (a): "An acquisition by or transferred to one of the petitioning carriers or another corporation, by purchase, sale, exchange, lease, or otherwise," etc.

My suggestion is that the committee find it desirable to make that run in favor of one or more of the petitioning carriers; so that the "right to operate all or a part of the properties and franchises of one or more carriers" may inure not simply to one carrier but may inure to another or other carriers. In other words, whether the rights, the running rights, or trackage rights, which are covered by this section should not be permitted to run to two or more carriers.

Experience shows that there are many instances in this country, and doubtless will be many more in the future, where it is highly desirable that these rights, trackage rights, rights of operation over another line, should be enjoyed by two or more carriers.

Mr. La Roe spoke with reference to the terminals. I should think it highly important that the rights should be given in a consolidation to two or more carriers to operate over terminal tracks. That, as you know, is common practice in the country.

Mr. Thom. Your suggestion is to insert in line 9 the words "or more"?

Mr. Moore. Yes; in paragraph (a), of section 203.

Now, with respect to section 205, which is on page 6 of this draft that I have here, I make the same suggestion, that the right to acquire control by stock ownership should run to any carrier or carriers. The section reads: "Any carrier, in order to bring about a unification through the securing of control by acquisition of securities," etc. If that were to read "any carrier or carriers," then it would fit in, it seems to me, more nearly with the practice in the country now and what we may assume will be the future practice.

For illustration, the railroad from Washington to Richmond I think is owned by some four or five carriers, and in that way the construction between those points has been one carrier instead of four or five, and thereby greater economies are secured, not only in capital expenditures but in operation. It is a highly desirable situation economically. I suggest that quite likely the committee would like to have that perpetuated.

Another illustration is the line from Spokane to Portland, which is owned in equal shares by the Northern Pacific and the Great Northern. No doubt other situations of a similar nature will arrive in the future, and by the addition of the words "or carriers" that will be corrected.

Senator Fess. The committee's attention was called to that yesterday.

Mr. Thom. I would suggest, Mr. Chairman, if I may—and I made this suggestion yesterday—that it will require not only line 17 to be changed where it will read "any carrier or carriers," but in line 21, after the word "carrier" there should be inserted the words "or carriers"; in line 24, after the word "carrier," there should be inserted the words "or carriers," and on page 9, in line 4, "petitioning carrier or carriers."

Mr. Moore. Yes; that is correct. I have construed paragraph (c) of section 203 and section 205 together. Colonel Thom thinks my construction is incorrect. He may be right, but I would like to bring it up to you. This paragraph (c) is an acquisition of securities by purchase, sale, exchange, lease or otherwise issued by a carrier, if such acquisition is proposed to be made as a part of a plan to effect unification under subdivisions (a) or (b) of this paragraph. I con-

strue that to be authority for a temporary acquisition of control through the purchase of securities. I do not read it as giving authority for a permanent acquisition of control through the purchase of securities. Section 205 I read as carrying out and amplifying the provision that I have just read. Section 205 provides that any carrier in order to bring about a unification through securing of control by the acquisition of securities, in accordance with the policy declared in section 202, the policy being, as I understand it, a temporary acquisition until the permanent consolidation can be put through, and may petition the commission for the approval of a plan to be effected by the acquisition by such carrier of securities issued by any other carrier or carriers, etc.

Now, if it be the meaning of that language, as it seems to me it is, that merely provides for a temporary control pending a final consolidation, then I would suggest the insertion of language which would give the commission power in special instances where the public interest will be promoted to permit a permanent control through the purchase of securities. The language that I suggest for that purpose is the following, to be placed at the end of section 205 or perhaps in section 205 just preceding the last sentence:

> In special circumstances where, in the opinion of the commission, the public interest will be promoted thereby, it may authorize and approve the permanent control by two or more carriers of another carrier through the joint acquisition of its securities.

If that thought is contained in the bill as it is now written, of course, it is unnecessary to repeat it; but I do feel that that thought should be plain in the bill because for obvious reasons it is highly desirable.

Mr. THOM. May I ask a question, Mr. Chairman?

Senator COUZENS. Certainly.

Mr. THOM. May I call your attention to the fact that in section 203, paragraph (c), as you speak of it, which is really paragraph (d) in the suggestion of amendments, there is one of the forms of unification, permanent unification.

Mr. MOORE. You may be right, Colonel, but I do not read it that way.

Mr. THOM. You read it that it is one of the forms of unification?

Mr. MOORE. No, sir; I read it as a temporary measure which may be put into effect pending a final consolidation or unification.

Mr. THOM. Well, is not this true; that in paragraph 2 of section 203 it is stated that the plan of unification, because it refers to what is said in paragraph 1, may provide for one or more of the following, and that unification provided in paragraph (d) is one of the methods?

Mr. MOORE. I have not your draft before me. I only desire to get the thought before the committee. If it is in here already, you do not need to repeat it, of course; but if it is not there so plainly as not to be debatable, it seems to me it would be very appropriate to insert it.

Mr. THOM. I want to say for the record here, Mr. Chairman, that I think it is undeniably in there now too plain for discussion, and that Judge Moore's apprehension on the subject need not worry him. I think it is there, and the reason that I think it is there is because paragraph (d) to which he has alluded, and which he has called paragraph (c) from a different form is one of the cases provided for under the heading of a plan for unification.

Senator COUZENS. Well, the committee will consider it when it comes up.

Mr. MOORE. If it is there, that is sufficient, but I think it should be there without any ambiguity.

Now, I desire to call attention to paragraph 2 on page 8 of the draft that I have here.

Senator FESS. In what section is that?

Mr. MOORE. It is in section 207. That reads:

> The carriers and the commission shall give due consideration to the inclusion in the plan of short and weak carriers in the territory involved; and in order that the policy declared in section 202 of this title may be carried out, the commission is directed to make and have available for its use, a study of the short and weak carriers.

With respect to a short line which has but one connection; that is, it connects with but one trunk line and that the petitioner or one of the petitioners, I think this is amply sufficient, but the great majority of short lines have more than one trunk connection. Some of them have four or five or even more. I desire to bring to your attention the question of whether this is sufficient to cover a case of that kind.

Let us assume that the petitioning carrier connects with four or five short lines and they in turn have four or five trunk line connections. The only parties before the commission are the petitioning carriers and such intervenors as there may be. The other trunk lines connecting with these short lines are not before the commission. There is no present power in the commission to make them parties. There is a provision in section 13 which gives broad powers to the commission to bring in other interested parties, but whether that would apply in a case of this kind I think is debatable.

Now, when a petitioning carrier has these short lines with various trunk connections, it seems to me that it would be highly desirable, in order to work out an intelligent disposition of the matter, for the commission to have positive authority, specific authority, in the act to bring in the other trunk lines which connect with the short lines which we will say have intervened in the case.

Senator COUZENS. For what purpose?

Mr. MOORE. For the purpose of a proper allocation of those short lines. Let us take the short line X. Y. Z. It has five trunk line connections. The petitioning carrier is one of those trunk lines. The question naturally would arise as to which of those five trunk lines should take over and acquire this particular short line. The only trunk line carrier before the commission is the petitioner; the other trunk line carriers are not before the commission.

Senator COUZENS. Might it not be before the commission as an intervener?

Mr. MOORE. It might and it might not.

Senator COUZENS. You want to compel them to come in?

Mr. MOORE. No. Let us suppose they are before the commission as interveners. Now, the petitioning carrier will perhaps think—they have thought—that this particular short line should be allocated to some other trunk line. They might think that its traffic fitted in better with this other trunk line that can be operated at less expense. So the intervening carrier may argue to the commission and offer

testimony that this trunk line with the five connections instead of being allocated to the applicant should be allocated to one of the other trunk lines. That situation has arisen before the commission. The commission should, in order to intelligently decide which of the five trunk lines should take over that short line, have the power to bring in the other trunk lines so that they may be heard and the question fairly and intelligently decided as to which of the five should take over this particular short line.

That involves another subject which is, perhaps, a little broader, and which I submit to you could very properly be included in the bill; and that is where a case of the kind that I have just supposed arises before the commission, would it not be wise if the commission had the power to make an allocation of the short lines in that particular territory, or that particular district, by bringing in the trunk lines that are interested, letting them all be heard, and then let the commission say that this short line should be allocated here, this other short line here, etc.? That does not mean that any except the petitioning carrier would be required then and at that time to take over any of the short lines, but it would be a permanent allocation and disposition of the short lines in that territory; so that after everybody had had a chance to be heard, every trunk line in the territory would know what its responsibilities were.

If the committee should feel that that position is well taken, then it could be expressed, and I have endeavored to express it here by adding a sentence to paragraph 2. This is the sentence:

> The carriers and the commission shall give due consideration to the inclusion in the plan of short and weak carriers in the territory involved, and, in order that the provisions of section 202 may be carried out, the commission may then, or subsequently, make any other carrier or carriers in the group or region parties to the proceedings, and, after hearing, may make such orders relative to the proper allocation of the short or weak lines therein as the public interest may require.

I do not know whether the commission has expressed any opinion upon it or not, but I have reason to feel that the commission would welcome a provision of that kind. Take, for illustration, the southwestern region, with which I feel fairly familiar. If you had an omnibus proceeding before the commission in which all of the trunk lines and all of the short lines in that territory were made parties, everybody had an opportunity to be heard and the advisability of allocating this short line to that trunk line could be thoroughly threshed out, and the commission could then establish its program, the short lines in that territory would be all taken care of; that is, they would not be taken over immediately but the allotment would be made and every carrier would know what its responsibilities were and every short line would know what its destiny was.

Senator FESS. In the insertion of your amendment you have omitted all after the word "commission" in our print. I see that you have the other bill. It is on page 12. Your amendment comes in right after the word "commission," and you have omitted all of this [indicating]. Did you mean to do that?

Mr. MOORE. I have omitted the following:

> But without postponing for the purpose of any general study the consideration of an action upon any plan proposed under this title.

Senator FESS. This was inserted in the interest of the short line people. There has been a question as to whether we should delete

it entirely, but they do not want it deleted and want to be heard before any step is taken.

Mr. MOORE. Of course, it all depends upon the view the committee may take of the short line problem. I have assumed that the short line problem was to be taken care of in this bill. If you do take care of it, then you do not think that it is wise to adopt some such plan as this where an allocation of short lines would be made in a proceeding where everybody is present and has an opportunity to be heard and the relative advantages of allocating a short line with this trunk line or that trunk line or the other trunk line will be made to appear in the testimony?

Senator FESS. As I understand it, your proposal would be not in a matter of intervener but rather to make the trunk line a party to the petition?

Mr. MOORE. Yes.

Senator FESS. Whether the trunk line wants to or not?

Mr. MOORE. Yes. That is to say, if you have an intervening petition by a short line which has four or five or six connections with trunk lines, then before that short line is allocated to the petitioner, or to anybody else for that matter, those other trunk lines should be brought in by process and due consideration given as to whether that short line should be allocated to line "A", line "B", or line "C".

Senator FESS. I see what you have in mind. We will make it a general study of that particular locality.

Mr. MOORE. I think it should be a general study, but the study should be, perhaps, by regions. Doubtless the commission would do it in that way in any event.

I have not put it in my memorandum, but I think it would be very wise if the commission in case you are going to deal with the short lines should start right away to make a valuation of the short lines for the purpose of purchase and sale. If all of the short lines are going to come under this bill, the sooner that is done the better. The commission's valuation is stated by it to be for rate-making purposes, and the commission itself states that that is not a value for purchase and sale and is not a guide for such a value. That is a suggestion outside my memorandum here, but I do think it would be a wise thing if the bill is to take care of all of these short lines.

Senator FESS. There is no doubt about the purpose of the bill. One of the specific purposes is in connection with the short line.

Mr. MOORE. I have so understood it.

Senator FESS. May I make the suggestion, Mr. Moore, that in your proposals it would facilitate the committee's procedure very much if you would submit not in the form of a brief but the actual amendment that you want and where you would insert it in the bill, so that when we have it in our executive session we may have the specific proposals.

Mr. MOORE. Yes; I will file it with the clerk.

Mr. THOM. Mr. Chairman, may I say that I am informed that Judge Moore has already discussed this matter with some of the other counsel, and the one to whom I especially allude has earnest objections to this suggestion, and I want an opportunity for him to be heard by the committee.

Senator FESS. That is what we also want. We want every side of it presented.

Mr. MOORE. In connection with the short lines, I have a further suggestion to make. This is a matter which I think has been considerably discussed before. That is, in line 8, on page 11, whether the following language should remain in the bill; that is, whether or not any intervenor's petition has been filed. The meaning of that is, as I understand it, that if an applicant is before the commission for authority to consolidate the commission may, under this language, impose a condition upon the consolidation that the petitioner shall take over and pay for some carrier which has not intervened and which has not manifested any desire to be taken over; what I would call an unwilling short line.

If it is the thought of the committee that in that way all of the short lines under this bill would be taken care of, I think the language does not accomplish that. Of course, there are two classes of short lines; what we call the weak short lines; that is, those which are not prosperous, and, perhaps, are not earning their expenses, and then the other form of short lines which are the relatively prosperous short lines. I do not know whether it is the desire of the committee that all short lines, both the weak and the strong ones, shall be taken care of in this bill.

Senator COUZENS. I think the witness, perhaps, does not have the same meaning that I have. I do not understand that they are to be taken care of except where it is in the public interest.

Mr. MOORE. Yes; I quite understand that. I mean by "taken care of" the allocating to some trunk line and required to be taken over and acquired by some trunk line. If it is the purpose, as I gather in the bill, that all of the short lines should be dealt with and that all of them should be allocated to some of the trunk lines, I do not believe that this language accomplishes that result, for this reason: If in the making of an order of approval and authorization of some consolidation the commission shall attach as a condition that the applicant shall take over and pay for a short line, which we shall call X. Y. Z., which is a prosperous short line and which is not intervening, then what is the result? The result is that the petitioner is required to negotiate with that prosperous short line. The prosperous short line does not want to be taken over and there are cases of that kind of record. If it does not want to be taken over, it simply puts a prohibitive price on the property. That is reported back to the commission and the commission finds that the price is prohibitive and permits the consolidation to go on without the short line.

It seems to me that all of the short lines should be allocated under this bill, the strong ones as well as the weak ones. If the trunk lines are to be required to take a streak of lean, should they not also be permitted to take a streak of fat along with it? And if it be the intention that all the short lines, the strong and the weak, shall be dealt with and shall be disposed of under this bill, then would it not be necessary to eliminate this parenthesis, and would it not be necessary to go further and provide some method of condemning the property or the stock of unwilling short lines?

I can give you an illustration of record. In the application of the Kansas City Southern to acquire control by stock ownership of the Katy and the Cotton Belt, the Midland Valley, which is not very short, being about 400 miles long, and the commission's value being

only $11,000,000, was a desirable line for the combination to include. The officers of the Midland Valley—I am not criticizing them, because they may have been entirely right—did not want to belong to our combination; they did not want to belong to any combination; and they so testified before the commission. They said it was their property and they intended to remain independent and not enter in combination. Now, how are you going to deal with a situation of that kind?

Senator COUZENS. Did the commission at that time say that it was in the public interest to take over that line and make it a part of some other system?

Mr. MOORE. No; they did not say anything about it because the issue was not before them. It could not be presented because the Midland Valley was in a position to say, "We do not desire to sell; we are satisfied; we have a good property and we want to continue to operate it without interference by any other system."

Senator FESS. Does not that provision on which you have commented make it possible to do the very thing that you are saying? Suppose the Midland Valley did not want to come in and, therefore, it would not intervene, but the commission says it should come in and there shall be no consolidation unlesss it does come in?

Mr. MOORE. I think not; and that brings up exactly the thing I have in my mind.

Senator COUZENS. I think that is a point that we have been trying to avoid, compulsory consolidation. In other words, if the Midland Valley Railway does not want to come in there is no way we should force it to come in.

Senator FESS. Then we do not have any consolidation.

Senator COUZENS. No. In other words, unless the Midland Valley Railway by a majority of its stockholders desires to come in, there is no way, nor do we intend to have any way, by which it could be forced to come in.

Senator FESS. Then there would be no consolidation.

Senator COUZENS. That is what we intend.

Mr. MOORE. If that is the view of the committee then my suggestion is not appropriate. My suggestion was based upon the thought that it was your intention to deal under this bill with all short lines and secure now or later their complete allocation to trunk lines so that there would be only the systems which are to be constructed under this act. I fully agree that the creation of systems is not a matter to be accomplished by any compulsory process at the present time, but when the bill provides for the taking over of the weak and short lines, it seems to me that the same rule might very properly apply to all short lines.

Senator COUZENS. There is nothing compulsory in this bill about taking over weak lines. I think the witness is confused if he thinks we have an idea of taking over even weak lines.

Mr. MOORE. You do compel here, do you not, that the commission may impose a condition that the consolidation shall not take place unless the applicant takes over certain specified short lines?

Senator COUZENS. That is true, but that may prevent the consolidation. We can not help that and do not intend to try to help it.

Mr. MOORE. If that is the committee's view, my suggestion I do not think would be very appropriate.

One other feature of the bill I desire to call attention to and I shall have concluded. There is at the present time no restriction whatever upon the power of States to tax carriers engaged in interstate commerce. The courts have said for many years that the power to tax involves the power to destroy. Every one will concede that the interstate carriers should pay their fair and just proportion of State taxes, and I think no one would claim that interstate carriers ought to pay any more or any less than their fair and just proportion of State taxes.

Senator CUMMINS. Who determines that?

Mr. MOORE. As to what is fair and just?

Senator COUZENS. Yes.

Mr. MOORE. Well, when the parties can not determine it it has to be determined in court, I suppose; and at the present time there is no law, there is no rule of law made by the courts which will insure a fair and equitable assessment as between railroad carrier property and other property in the State.

Senator COUZENS. Do you contend that Congress has the power to regulate State taxation?

Mr. MOORE. I think Congress has the undoubted power to prevent discrimination against interstate properties. I do not think there is any question about that, and that is the only thing that I have in mind, whether it is desirable.in this bill under the head of "Revenue" to take some steps which will effectively prevent a discrimination in favor of or against the properties of interstate carriers. There is ample precedent for it. As you know, there is a limitation upon the power of the States to tax national banks.

Senator COUZENS. They have a national charter and that is a somewhat different case, I think.

Mr. MOORE. The source of the power is different. The source of the power there is a national incorporation, but here the source of the power is an instrumentality of interstate commerce. The source of the power may be different, but I think the power undoubtedly exists. The interstate commerce act as it now stands prevents discrimination as between interstate rates and State rates, as you know. The suggestion that I have in mind is that it is undoubtedly within the power of Congress to prevent a discrimination in favor of or against the properties of railroads with respect to State taxation.

Senator COUZENS. Have you any evidence to justify your contention that Congress is attempting to regulate that?

Mr. MOORE. I have not here, but I would be very glad to provide a brief on the subject.

Senator FESS. Mr. Moore, you are discussing one of the most complicated of all the questions here, and you are using what we are able to do in matters connected with national banks as an example. The committee would like to have you submit a brief indicating whether we have the same power in interstate commerce on matters of trade without a national charter to regulate State taxation on that matter as we do in the case of the national bank. I would like very much to have the data on that.

Mr. MOORE. I shall be very glad to furnish that. I will make this suggestion, which shows that the law must be so. If the States could by assessing railroad property relatively higher than other property in the States force railroad companies to pay an udue proportion of State taxation, to that extent it depletes the revenues of the carrier and deprives them of their ability to perform interstate commerce.

Senator FESS. I see what you have in mind, but I doubt seriously whether you are right in that respect.

Mr. MOORE. I will be very glad to furnish you a brief on the subject. That concludes what I have to say.

Mr. THOM. There is one aspect of this that I think I should call Judge Moore's attention to, as he may want to comment on it. I entirely agree with him as to the power of Congress to protect an instrumentality of interstate commerce from undue oppression and taxation by the State. I think the power exists. There was in this bill at one time a provision similar to the one that Judge Moore is now suggesting and having the same purpose in view as that which he is now advocating. The provisions then in the bill relating to taxation were divided into two classes. One was for taxation on the processes of consolidation which Congress is obliged to protect if they are going to bring about consolidation, and the other was a provision providing for how the States might thereafter tax the instrumentalities of interstate commerce not connected with the question of consolidation. In presenting that to the committee I was met by the suggestion from the present chairman that the effort in a consolidation bill to deal with the future taxation of railroad properties was not germane; and, in consequence of that objection it went out. Now, you will find that, Judge, in the minds of these gentlemen, and if you wish to discuss that I think you should have an opportunity.

Senator COUZENS. At that point I would like to say that if there is any attempt of this character in connection with this bill there will be violent objection in Congress to such an attempt, in my judgment, and I do not believe we will get any bill through if we attempt to interfere with the question of State taxation.

Mr. MOORE. May I read, Mr. Chairman, the suggested clause? It is as follows:

> Transportation by any State or any political subdivision thereof shall be without discrimination in favor of or against the carrier property employed in interstate transportation.

Do you think there would be objection against a clause which merely stated that there should be no discriminatin for or against?

Senator COUZENS. As I stated before, I do not think it is germane to a unification bill. We are trying to make this a bill giving strictly unification and the methods of accomplishing it.

Mr. MOORE. Yes; that is true, but, at the same time, it deals with taxation, and taxation, as Colonel Thom says, is incidental to the process of consolidation.

Senator FESS. My chief interest is to get the data upon our constitutional authority to do this.

Mr. MOORE. I will undertake to send that to you and also to give you a short statement of the amendments which I have suggested.

Senator FESS. Have you filed your memorandum with the committee?

Mr. MOORE. I submit it now.

(The memorandum referred to is as follows:)

SUGGESTED AMENDMENTS TO THE FESS BILL, S. 1175

I. It is suggested that at the end of section 214, page 21, dealing with "Taxation." the following be inserted:

"Taxation by any State or any political subdivision thereof shall be without discrimination in favor of or against carrier property employed in interstate transportation."

There is at the present time no restriction upon the power of States to tax carriers engaged in interstate commerce. It is said by Chief Justice Marshall in M'Culloch *v.* Maryland (4 Wheat. 431), "The power to tax involves the power to destroy." In upholding an act of Congress providing that Federal land banks and National farm loan associations should be exempt from State taxes, the court said (Smith *v.* Kansas City Title & Trust Co., 255 U. S. 180, 213):

"The exercise of such taxing power by the States might be so used as to hamper and destroy the exercise of authority conferred by Congress, and this justifies the exemption. If the States can tax these bonds, they may destroy the means provided for obtaining the necessary funds for the future operation of the banks."

Everyone will admit that interstate carriers should pay their just proportion of State taxes; but should there not be some provision in the law which will limit their contributions to State government to a fair and just proportion"

The extraordinary increase in railroad taxes is a matter of common knowledge. The total taxes paid by Class I railroads in 1911 were $98,950,000; in 1916, $157,113,372; and in 1926, $388,922,000, an increase of 293 per cent over 1911.

Federal taxes paid by Class I railroads in 1911 amounted to $4,870,000; in 1916, to $12,530,949; and in 1926, to $109,817,494, an increase of 2,155 per cent over 1916.

It is commonly believed that railroad property is assessed at a higher percentage of its true value than farm property and other property in the State. Instances where courts have found this to be the fact are:

Board of Directors *v.* Prairie Pipe Line Co., 292 Fed. 474; K. C. Southern Ry. Co. *v.* Ogden Levee Dist., 15 F. (2d) 637; Boonville National Bank *v.* Schlotzhauer, 298 S. W. 732 (Mo.).

It is certainly true that the opportunity exists to impose a higher assessment, and therefore a higher tax, upon railroad property than upon other property in the State.

If railroad property is assessed at a higher rate than other property in the State, there is no remedy at law or in equity, unless clear proof is made that the taxing officers have made an intentional discrimination against railroad property and have adopted it as a practice. This is clear from what is said in Chicago Great Western R. Co. *v.* Kendall (266 U. S. 94):

"The averments of both bills make a case of unjust discrimination against complainant's property in that there is an intentional systematic undervaluation by State officials of Iowa of other taxable property of the same class, when the complainant's property is assessed and taxed at a much higher rate. In such cases the Federal authorities render it clear that the complainants may have the remedy by injunction in equity to prevent the taxation of their property at any higher rate than that imposed upon the property of those in whose favor the discrimination exists (citing cases). It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. There must be clear and affirmative showing that the difference is an intentional discrimination and one adopted as a practice."

To the same effect are:

Southern R. Co. *v.* Watts, 260 U. S. 519; Sunday Lake Iron Co. *v.* Wakefield, 247 U. S. 350; Sioux City Bridge Co. *v.* Dakota County, 260 U. S. 441; Raymond *v.* Chicago Union T. Co., 207 U. S. 20; Greene *v.* Louisville & I. R. Co., 244 U. S. 499.

Ample precedent exists for legislation by Congress with respect to taxation. With respect to national banks, there is a limitation upon State taxation, with respect to the rate, and the following provision is made with respect to real property.

"Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed." (U. S. Compiled Statutes, 1925, sec. 9784.)

The same provision is made with respect to taxation by States of the shares of national agricultural credit corporations, or of dividends, or of the income, or of real estate owned by them. (U. S. Compiled Statutes, 1925, sec. 9835½h(i).)

These statutes have been upheld in the following cases:

First National Bank *v.* Anderson, 269 U. S. 341; Smith *v.* Kansas City Title & T. Co., 255 U. S. 180; Merchants' Nat. Bank *v.* Richmond, 256 U. S. 635; First National Bank *v.* Adams, 258 U. S. 362; Des Moines National Bank *v.* Fairweather, 263 U. S. 103.

II. It is suggested that paragraph (2) on page 8 be amended to read as follows:

"The carriers and the commission shall give due consideration to the inclusion in the plan of short and weak carriers in the territory involved; and in order that the provisions of section 202 may be carried out, the commission may then or subsequently make any other carrier or carriers in the group or region parties to the proceeding and, after hearing, may make such orders relative to the proper allocation of the short or weak lines therein as the public interest may require."

The bill as it stands is amply sufficient to take care of short lines whose only trunk line connection is with the applicant or applicants. But the great majority of short lines have more than one trunk-line connection. It is obvious that when a short line with several trunk-line connections intervenes for the purpose of being taken over by the applicant; the commission can not act intelligently in apportioning such short line between its various connections unless all the connections are present before the commission and have an opportunity to be heard. The commission, clearly, should be empowered to bring in all interested trunk lines so as to be able to determine that such-and-such short lines, and no others, should be allocated to the applicant.

III. Should not section 205, page 6, be amended so as to make it operate in favor of "any carrier or carriers," instead of "any carrier"? Instances have frequently arisen where it has seemed desirable for two or more carriers to control a third carrier through stock ownership. The commission has permitted this, under paragraph (2) of section 5; but it is very doubtful if it is authorized so to do. It would not only remove an obvious ambiguity, but also carry out the purpose of the carriers, to amend the section to cover an acquisition of control by more than one carrier.

The same suggestion is also made with respect to section 203, page 4.

Should not the following be added to section 205?

"In special instances where in the opinion of the commission the public interest will be promoted thereby, it may authorize and approve the permanent control by two or more carriers of another carrier through the joint acquisition of its securities."

IV. Should not the words in parenthesis, line 22, page 7, "(whether or not any intervenor's petition has been filed)," be eliminated, or, in the alternative, a method provided for the condemnation of an unwilling short line, with an appropriate provision for making the terms of payment within the means of the applicant?

If the purpose of Congress is to secure the inclusion of weak short lines into any consolidation, the quoted words are unnecessary, since paragraph (3) of section 206 makes ample provision therefor.

Apparently, the purpose of the words in parenthesis and the language following is to impose the obligation upon the applicant to take over a prosperous short line, to the end that all weak lines and all short lines may be included in some system. But the language does not accomplish this result. If an unwilling short line is designated by the commission as a party to be brought into the consolidation, such short line has only to name a prohibitive price, and thereupon it is left out of the combination, and continues to carry on as an independent line. The Midland Valley is an illustration. If unwilling short lines are to be brought into a consolidation, it is necessary that provision be made for the condemnation of their properties, or of their securities. Furthermore, the immediate payment of a large cash award in condemnation might be beyond the ability of the petitioning carrier, and provision should be made for the payment of the purchase price in some practical manner.

Senator COUZENS. Have you any other witnesses, Senator Fess?

Senator FESS. Not unless Mr. Williams is here.

Senator COUZENS. Senator Hawes's secretary presents a letter from Mr. Williams of the Missouri Pacific Railroad Co. which he desires to have inserted in the record in lieu of a statement by Mr. Williams before the committee. Without objection that will be done.

Senator FESS. Then, Mr. Williams will not appear?

Senator COUZENS. No.

(The letter submitted by Mr. William H. Williams of the Missouri Pacific Railroad, is as follows:)

MISSOURI PACIFIC RAILROAD CO.,
CHAIRMAN OF THE BOARD,
New York, N. Y., January 12, 1928.

DEAR SENATOR HAWES: From our telephone conversation, it would appear that my views were sufficiently presented in my testimony before the committee, at its meeting on January 28, 1927, excepting that I did not bring out all that might have been said with reference to the change I suggested in paragraph (1) of section 207.

Railroads are owned in two ways, viz, through concentrated holdings and through widely distributed holdings. Where there are concentrated holdings, it is ordinarily possible to reach an agreement as to the terms of purchase which are binding upon both parties, subject, however, to securing the necessary approval of the Interstate Commerce Commission. Where holdings are not concentrated, negotiations can not be conducted with a few people; with but few exceptions, the acquisition of such lines would necessitate buying the capital stock in the open market and, with the exception of the short lines, this would mean securities listed on the public exchanges. The moment any public body should state that one road should buy another road, the securities of which are listed on the market, pools would be organized to buy some of such securities and the price would advance so substantially as to materially alter the desirability of the acquisition, if not to make it quite undesirable. Under these conditions, it seems to me, were any public body to state that one road should buy another, the securities of which are listed on an exchange, they would probably defeat the real purpose of the act, as they would either delay or make undesirable the purchase.

Of course, all will appreciate the fact that at least two transactions are involved in acquiring a railroad. First, the negotiation, if control is concentrated; or the buying of the securities in the market, if they are widely distributed; and, second, the financing of the purchase. For the acquisition of the larger railroads which are to be brought into a consolidated system, the question of financing is of the utmost importance. A substantial block of securities can be acquired in the open market without creating a runaway price before publicity is given the matter and the purchaser is in a position to form some reasonable idea as to the approximate average price which he would pay and, by extending his purchase over a sufficient length of time, acquire them on the most reasonable basis, making his financial arrangement accordingly.

On page 160 of the record, reference is made to the question asked me as to the Fort Smith & Western, and I stated it did not appeal to me so much as did the acquisition of the Kansas, Oklahoma & Gulf and the Midland Valley. I further stated that the price asked for the Fort Smith & Western was more than we felt we could afford to pay. This is quite different than saying we would not be willing to buy a railroad at a fair price.

The Fort Smith & Western, being one of the short lines, is in the position that it could, under section 206, ask the Interstate Commerce Commission to protect it in connection with consolidation proceedings involving Southwestern roads where any such consolidated system has a physical connection with the Fort Smith & Western. Mr. Cain, on page 164, has very clearly shown that, in the consolidating of the railroads, the Fort Smith & Western more properly belongs to some system other than the Missouri Pacific. In this connection, it does seem to me Mr. Cain has made an unfortunate selection of a railroad to illustrate his point. If the information given me be correct, that railroad is owned by parties who have sufficient financial means to buy all or substantially all of the railroad mileage in the Southwest and, if that be true and somebody has to stand a part of the loss of the total investment in the Fort Smith & Western, ought not some consideration be given as to the relative ability of the several parties to stand such loss?

Comments as to protection afforded by section 206 would be true not only as to the Fort Smith & Western, but they would be true of any railroad which is desirous of being included in a consolidated system, so that both the public interest and the owners of such a railroad would be given due consideration at the proper time.

To the extent I have mentioned any individual road, it has been for illustrative purposes. I could have given an illustration of a road, the securities of which were purchased at a price which, we are told, was below $25 and for which we have been asked an average price of approximately $200 and notwithstanding some of these securities were purchased below $25 during the time our negotiations were in progress. I mention it only now as illustrative of some of the information which is in our possession regarding some of the lines we have considered and as indicating the reason we have not gone forward with their purchase, feeling confident the committee would take exception to our giving consideration to prices which appear to be so out of line with the earning capacity of the road. Clearly, the purchase of other roads on such a basis would, to the extent acquired, adversely affect the credit of the purchasing road, and anything which adversely affects the credit of a consolidated system must, in the final analysis, proportionately affect its ability to finance its necessities and render proper service to the public and, therefore, to my mind, would be against public interest.

Mr. Cain appears to have the impression the Missouri Pacific system is completed except as to the acquisition of one or two small lines. With two or three exceptions we have acquired all the lines having substantial mileage which we regard essential to a well-rounded system. We have also acquired a number of the smaller lines and the securities of one or two have been purchased since my appearance before the committee last February, and our time can now be given to taking up in an orderly way the various factors which should be considered in connection with the lines not so essential.

Should it be satisfactory to the committee to have this letter inserted in the record, it will obviate the necessity of my taking up part of their valuable time. If, after reading it, they desire any further information, I shall be glad to accommodate myself to their convenience.

Yours very truly,

WILLIAM H. WILLIAMS.

Hon. HARRY B. HAWES,
Senate Office Building, Washington, D. C.

Senator FESS. Mr. Chairman, I understand that Mr. Fulbright is to appear tomorrow on behalf of the Industrial Traffic League.

Senator COUZENS. Is there anybody present representing the short line railroads?

Mr. PAUL MOORE. Mr. Cain and Mr. Robinson understood that all the time this morning would be occupied and also that all the time tomorrow morning would be occupied.

Senator FESS. But we expected Mr. Williams to be present today.

Mr. THOM. Would it be possible for Mr. Cain and Mr. Robinson to come here this morning?

Mr. PAUL MOORE. It would take them at least 20 minutes to get here, and Mr. Cain told me this morning that he would take about two hours for his statement.

Senator COUZENS. I doubt the wisdom of awaiting the arrival of other witnesses this morning. Have you any fruther statement that you would like to make at this time, Colonel Thom?

Mr. THOM. Not right at this time, Mr. Chairman, I want an opportunity to comment on some of the things that have been said before you get through. My comments will doubtless be brief and can not with advantage be made now.

Senator COUZENS. We will adjourn now until 10 o'clock to-morrow morning.

(Thereupon, at 11 o'clock a. m., the committee adjourned until 10 o'clock a. m., Saturday, January 14, 1928.)

CONSOLIDATION OF RAILWAY PROPERTIES

SATURDAY, JANUARY 14, 1928

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10 o'clock a. m., in the committee room, Capitol Building, Hon. James Couzens presiding.

Present: Senators Couzens and Fess.

Senator COUZENS (presiding). The committee will please come to order. Mr. Fulbright, you may proceed now.

STATEMENT OF R. C. FULBRIGHT, CHAIRMAN OF THE LEGISLATIVE COMMITTEE OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, HOUSTON, TEX.

Mr. FULBRIGHT. Mr. Chairman and gentlemen of the committee, I appear here in behalf of the National Industrial Traffic League with respect to the consolidation that is now being considered by your committee. I am chairman of the legislative committee of the league and reside at Houston, Tex.

The National Industrial Traffic League is a national organization of shippers who are interested in the shipment of freight over the railroads and in the transportation of passengers and generally in all transportation subjects, both rail and water.

Senator COUZENS. May I ask at that point if you are going to tell us the extent of the membership of your organization?

Mr. FULBRIGHT. Yes. Every town and city, with one or two exceptions, of 50,000 or more in the United States, has a membership in our organization, which membership is through their local freight bureau or local chamber of commerce, where the chamber of commerce maintains a freight bureau for shippers, and the head of the freight bureau is usually a representative in our organization. Of course, through our membership we reach many thousands of shippers.

We also have numerous individual shipping concerns that are members; manufacturing concerns, agricultural and other kinds of concerns, that are interested in shipping, associations, such as for example, the Southern Pine Association which is made up of the lumber mills in the South, and similar associations elsewhere in the country.

We function through committees, and these committees, after making investigations, submit reports to our members, and after the reports are made to the members we have annual meetings, or sometimes we will have two meetings within a year, at which we take up

the consideration of these various reports and determine the action that we will take.

There are no railroads that are members of our organization; they can not be. I happen to be eligible as a member because I am the president of a private corporation that is interested in shipping in my home city. I am, however, a practicing attorney and have been practicing for about 20 years, about half of which time was in the service of the carriers and the last half of which has been on the shippers' side of the docket.

I mention my experience briefly for this reason: We undertake as the league to deal with principles. We do not, as a general rule, go into the finesse or technical minutia of statutes. In other words, there are a number of matters in this proposed bill which have been put before you by Commissioner Hall which deal with minute or technical changes. Any matters of that kind are left to the discretion of the committee or the particular representatives of the league, but the league committees go into great detail in the consideration of what they determine to be the principles that are at stake in any proposed program of legislation.

I may say that we are entirely in accord with the statements made by Commissioner Hall that the present law with respect to consolidations and acquisitions of control is unworkable and that there ought to be substituted for it a statute which will provide the machinery for an adequate procedure in bringing about such unifications or consolidations as may, under certain principles be found to be in the public interest. We think that that ought to be done without further delay. We want this committee to give thorough consideration to the subject, but we think it should be a prime order of business of Congress to settle this thing, because there has been a mandate in that statute for nearly eight years commanding the Interstate Commerce Commission to do something that we think they have not had wisdom enough, and no set of men have wisdom enough, to do, and which they have confessed their inability to do it. That condition should be relieved.

I want to discuss this morning the general principles that are involved in bringing about consolidation, and perhaps it would be well to deal with the subject in a historical way. In the general opinions that I shall express I may say that they have met with the unanimous approval of our membership in their meetings, as I shall later point out; but there may be some technical provisions, which, as I stated before, I may have to express an opinion upon that, as in the case of Commissioner Hall, have not been reviewed by the principals.

During the time that I served the railroads in my section a great part of my time was devoted not only to practice before the commission but to the intimate financial troubles of a small railroad company. I was in the office of the general attorneys, and, finally, was attorney for the receivers and later assistant general counsel of a small system that went through all the trials, troubles, and tribulations that railroads are heir to. I am in a position, I think, to appreciate some of the benefits and the values that may come from a proper bill bringing together railroad properties to serve better the public interest and to better establish themselves in their ability to meet the requirements of the public and to finance their undertakings. At the same time, I think there are some things that are of particular interest to the shippers which must not be lost sight of in any program that is devised by this committee.

The bill which you have before you has been formulated by the law committee of the Association of Railway Executives. On the whole, the general machinery of this bill, I think, is admirably conceived and admirably stated, and something along this line ought to be done. We want our position clear on that, but I also want to make it clear that the shipping interests in this country do not believe that consolidations are necessary. We do not believe that it is necessary in order to have an efficient functioning of our transportation machinery that there should be any large program of consolidation, and we do not believe that Congress should go further than to make a permissive plan under which these carriers may get their properties into better balanced systems as they see their needs. Consolidation is primarily a problem for financing a railroad property.

For many, many years in this country consolidations—and when I use the word "consolidations" here I wish you would understand that I am using it in its loose and popular sense, which includes any character of control acquired by one carrier over another, or any merger of their activities into a common system or common operative organization—for many, many years consolidations went on and on and systems of railroad were built up without the public having any concern over the subject, except that they were mere items of news interest in the papers. But as time went on the public did become concerned with the possibility of one line buying out a competitor and eliminating competition between carriers.

The first expression of any legislative enactments with respect to the subject of consolidations dealt with the desire on the part of the public to preserve competition. We find that in the seventies that became a subject of substantial consideration. In my own native State, Texas, in 1876 there was enacted in the consitution of that State a provision which I will read, as it is very brief:

> No railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchise of such corporation with, or lease or purchase the works or franchises of, or in any way control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line.

That is section 5 of Article X of the constitution of 1876, which is still in effect. Similar provisions were enacted by statute in a number of States and adopted in constitutions in a number of States. In the period of the seventies and the eighties quite a good deal of attention was given to the possibility, which the shipping public, by the way, viewed with alarm, of having competing lines merged into one system which would no longer compete.

I am aware of the fact that in those days we had competition in rates and that that was a material factor in the attitude which the public assumed toward consolidations. An interstate commerce act was adopted in 1887 for the purpose of preventing abuses which had grown out of not only competition but of a lack of any regulatory control over what a railroad might do. It was for the purpose of preventing favortism and insuring uniformity of treatment of the shipping public.

In 1890 the Sherman Antitrust Act, by which we made a declaration of policy in favor of the preservation of competition a part of our national law was passed, and I think the Nation still adheres generally to that policy. It is true that in the adjudication of cases under this act we have reached what may be termed a rule of reason; but, after all, competition is considered to be a fundamental factor in the stimulation of a high degree of competency and ingenuity and efficiency in our American industrial system.

When the antitrust law was passed in 1890, there were then in progress a great many railroad amalgamations or consolidations in various ways. Strange to say, it did not substantially stop this process. It did not substantially deter railroad construction. A very large part of the major systems of our country have been largely put together since the antitrust law was enacted. The reason that has been possible is that the courts have dealt with this subject of competition in a reasonable way.. They have not said that there can be in no instance any impairment of competition, but that it is fundamentally important to preserve competition as a whole.

The contention was made by the carriers after the Sherman antitrust law was enacted that it did not apply to transportation; that it applied only to commerce, and that commerce did not include transportation. That is not an accurate expression, but only a rough sketch of the contention; but, at any rate, the Supreme Court in 1897 in the case of United States *v.* The Trans-Missouri River Freight Association (166 U. S. 290), in a five to four decision determined that the antitrust act did apply to transportation and to so-called committees of carriers who would agree upon the enactment of certain freight rates and thereby might restrain competition in freight rates.

In 1898 another similar decision was rendered in the case of United States *v.* Joint Traffic Association. (171 U. S. 505.) But the first case to involve the question of acquisition of control was the Northern Securities case, decided in 1904 (193 U. S. 197), which grew out of the formation of a common ownership through a holding company of a consolidation, to speak in this rough sense, of the Northern Pacific and the Great Northern Railroads.

I give that brief résumé to lead up to this: Following the transportation act in 1920 and within the years of 1923 to 1926 there were quite a few people who proclaimed in various ways through articles in financial periodicals and magazines that a new policy of the law had been adopted; that the old Sherman Antitrust Act had been repealed, in so far as railroad consolidations were concerned; and that it was now the policy of the law and the desire of people that the railroads be reduced to a small number of large systems and that competition was simply a factor to be considered, but that it should not get in the way of any such program.

Senator FESS. It is interesting, Mr. Fulbright, to notice how public opinion goes in cycles. For a long while the slogan was "Competition is the life of trade." Later on there was a reaction and we heard "Competition is the death of trade." I notice that in college circles at one time one note was a debatable question with emphasis on the one side, then there was a period of reaction that went the other way. It is quite interesting. We are right now in an interesting phase of thinking along the same line.

Mr. FULBRIGHT. Senator, the remarks that you have made demonstrate to me the very great importance of our organization of shippers disabusing the minds of Congress as to the attitude toward competition among carriers. I want to say to you that never at any time in any meeting of shippers' organizations for the past several years has the subject of consolidations been dealt with but what they gave forth an affirmative proclamation that competition should be preserved. There has been no such public sentiment among the shippers. It has largely originated with financial interests and with so-called investment banking interests.

Now, that is one of the main things that I want to accomplish here; I want to demonstrate to you that this matter of competition is not something upon which the public has gone to sleep, but we do not go into the newspapers with what we have to say about these matters. We do not try our problems in the newspapers.

In the first place, the 1920 transportation act did not have any such effect as some have ascribed to it. The question of competition was dealt with very specifically in that act. It provided in paragraph 4 of section 5 of the interstate commerce act as amended in 1920 that—

> The commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railroads of the United States into a limited number of systems.

I have quoted the language of the law. Then it proceeded to lay down in that same paragraph, and in the next sentence, the principles or the requirements under which that should be brought about, and I wish to read you that.

> In the division of such railways into systems under such plan competition shall be preserved as fully as possible, and wherever practicable the existing routes and channels of trade and commerce shall be maintained.

That is pretty strong language. It did recognize that in the working out of any consolidation there would be some impairment of competition, but there should at least be a rule of reason, and the major objective should be the preservation, as far as possible, of that competition.

After stating this fundamental first premise which I have read, the same section goes on to state:

> Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the value of the properties through which the service is rendered shall be the same, as far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

Senator FESS. Is not that a very difficult thing to carry out?

Mr. FULBRIGHT. The last part of it is impossible.

Senator FESS. I think so.

Mr. FULBRIGHT. And I do not think that Congress ought by direction or indirection impose any such mandate upon the regulatory body. I may say that there are as many theories as to consolidation as there are remedies for rheumatism. Every man who has an interest in a particular proposal has a particular theory as to consolidation. We wish to deal with this in its major aspect, and in formulating a statute we should lose sight of the particular individual case.

The first part of that statute as to the preservation of competition was very positive. It is true that elsewhere in the statute there was a suspension of the application of the antitrust law to a consolidation which pursuant to these principles should be found to be in the public interest. That is proper and it is proper that you have it in here, no matter what mandate there might be with respect to maintaining competition as a guide for the commission. The reason for that is simple. You confer upon the Interstate Commerce Commission, a quasi-judicial body, the jurisdiction to determine when this acquisition of control is in the public interest and to give an order authorizing that to be carried out. Now, having done that, you do not want those railroads that have gone into that undertaking to run the danger of being investigated by the Department of Justice and prosecuted or indicted for doing something which this other tribunal has been created to permit them to do. Therefore, it is important that the effect of the antitrust law shall be suspended when the consolidations are made pursuant to the consolidation act in order that the commission's work may not be hampered and in order that the railroads having thus received this authority may not be thereafter embarrassed; but it was not intended by the 1920 act, as I see it, to simply repeal the antitrust law; it was intended that the commission should preserve competition rather than the courts.

Now, let me tell you why. The shipping interests of this country, when the 1920 transportation act was passed, had just gone through a period of two years of railroad operation when there was not any competition, and they were heartily sick of it. The first hearings that were held after the armistice, and that only a few weeks after the armistice, were held by this committee of the Senate. At those hearings there appeared three representatives of shippers, one from the northwestern part of the United States, one from the southwestern part, and one from New England, all of them pleading for a speedy return of the railroad properties to the railroad owners, in order that they might get away from the lack of competition and revive the interest in the efficient operating service for the public by bringing them back to the control of their owners. From then to this day it has been considered of great importance by the shipping interests that that competition shall continue.

I shall later go into the reasons for this, but let me suggest at this time that there are so many ways in which competition helps the shipper. The difficulty is that the layman who is not dealing with transportation problems is unable to appreciate it. The people are prone to have the idea that when regulation steps in competition steps out. Through the regulatory power the rates are made uniform and in that uniformity you may say that competition in rates is largely decrease but not eliminated, as I shall demonstrate to you later. The ordinary manufacturing concern, or the ordinary merchant, or the ordinary small shipper and the farmers are not financially able to hire expert and trained traffic managers to determine what territory they can best reach and what routes they may employ and what rights they may have under the tariffs that are filed by the railroads. And yet they do receive a service from the soliciting agents of the railroads.

A large part of the solicitor's time is not taken up in asking a man to give him freight to ship, but in helping the shipper in knowing how he can ship or how he can route his freight. Many of them will help a man in routing freight or shipping it, although it may not be that his line will participate at all in the movement. He is doing it in the hope that where there is competitive movement he may get some of that business. These solicitors perform a service of untold value for the smaller shipper. They perform service for all shippers. So long as they are competing, just so long there is going to be the spur to give to the public the best service possible.

I hope I may be pardoned for naming some specific lines, but it is human nature to go back to my own experience. The Southern Pacific was the first railroad to operate a line between New Orleans and Houston, my home town. About 20 years ago the then Frisco Lines, later an independent line, built a line of railroad to compete with that from New Orleans to Houston. They had very poor terminal facilities and they had a poor roadbed. They also had to do some more or less frenzied financing in order to get the proposition through. I do not mean that in any critical sense, because if it were not for somebody taking long chances, many parts of this country would never have had any railroads. This line came in there very poorly equipped to compete with the Southern Pacific. They were rather regarded as a joke; and, in fact, they were the butt of all character of jokes by the traveling public. But they put on a freight service that materially shortened the time of the service theretofore rendered by the old line, and the shippers began to patronize them. They had not been paying operating expenses. They went into receivership. They were in just a miserable financial conditions. But they put on good service and they built up business, and no sooner had they put on this fast freight service than the Southern Pacific discovered that they could do the same thing and they put on such a service.

That competition made the Southern Pacific a much better railroad. They had the same men and were actuated by the same desires, but that spur of competition put them on their mettle and they built up business where there was not any business.

Now, what happened on the other end of this little independent line down in the Southwest? It was built out into a virgin territory where there were no railroads. They built 141 miles through a territory that was inhabited by only five white families into the lower Rio Grande Valley; but there was no competition down there and the most terrible complaints as to service began to arrive.

More recently another railroad has built in there, the Southern Pacific, by the way, and the spur of competition is keeping both of those railroads on their toes and the public is being given better service by reason of that competition. That is the reason that we want competition to be substantially preserved in this country.

Take New England. In New England you have a very peculiar situation. There is not a counterpart to it anywhere else in the country. The southern half of Massachusetts and Rhode Island and Connecticut is almost monopolized by one railroad system. In the northern half of Massachusetts and the southern half of New Hampshire another railroad system largely controls the situation. You would think that there being such little competition people

might take a different view of this thing. They have this view of it. New England is a manufacturing community. They want to preserve the competition of the lines that extend beyond their territory. These two systems do not go beyond the New England territory. They are right in it. They come down to New York City and they get to gateways out in various directions from the manufacturing district in New England; but when they get to the gateway with the traffic originating on this line, they have various competing railroad systems fighting for their business. These lines have their agencies in New England; they have their solicitors up there who go to these people and show them what markets they can reach. Take a small concern in Connecticut. He may get a soliciting agent of the Missouri, Kansas City & Texas Railroad down in Texas to show him how he can reach certain territories in the Southwest in competition with some manufacturer over in Pennsylvania or at some other point. We have a large number of those New Englanders in our organization and they are uniformly for a requirement in the law that competition shall be substantially preserved.

We made an examination of the situation in Massachusetts and found that out of 127 cities of 10,000 or more, according to the 1920 census, 98 had only 1 railroad. In the Southwest there is but 1 town of over 10,000 inhabitants, according to the 1920 census, in the whole southwestern area of 5 or 6 States that has not more than 1 railroad. When you go over the country generally and to any community of importance, you will find two or more railroads serving that community. That is a benefit to the railroads as well as to the community in our judgment.

Then, there is such a thing as competition in rates. I will give you one illustration, and I could give you many. Take the port of New Orleans situated on the Mississippi River. They are in the world's market for export and import commerce. There is a great producing area in Texas, Oklahoma, and Kansas. There are a number of railroads that run directly through Texas and Oklahoma to Kansas City and down to the Texas Gulf ports.

Now, the Texas & Pacific Railroad goes through the northern part of Texas from east to west, from Texarkana to El Paso, and it goes through a rich producing area in that State. Then its line runs on down to New Orleans. It had no line to the Texas ports. It put in a rate on export traffic to meet the rate being charged by the Texas lines to the port of Galveston. Why? Because there was competition.

Now, there was competition in rates there, and the competition in rates put in by that line, and then later by the Missouri-Pacific line, which had a line running up into southeastern Kansas and into northwestern Oklahoma to meet the competition of these direct lines going down to Texas ports. That competition in rates also was carried along with the competition in service and it inured to the benefit of the exporting public and the farmers whose products were shipped out to all the markets of the world.

Senator FESS. That is the case of an all-rail line competing with an all-water line?

Mr. FULBRIGHT. No, sir; it was the case of two all-rail lines competing. The Santa Fe runs through Oklahoma and Texas to Galveston. The Santa Fe had certain rates from North Texas and Oklahoma to Galveston on export commerce to meet the boats there, and the rates by boats are usually the same from Galveston and New Orleans to Europe because there is no substantial difference in the service.

The Texas & Pacific said, "We want our people over at New Orleans to get in on this business and we will equalize it," and the Missouri Pacific came on and equalized, and they gave New Orleans a big territory, and they gave them a rate advantage through that competition.

Senator FESS. I misunderstood your illustration. I thought the terminal was in New Orleans.

Mr. FULBRIGHT. No. Let us go a little further with that same illustration. Later on my home city began to have aspirations as a port. We established a port there and we found that we did not have any through rates. How did we get them? We would have been years getting them but for the cooperation and help of some lines that were purely Houston lines. The lines that were purely New Orleans were trying to block us in every way because they wanted to protect New Orleans.

That keen competition is the thing that needs to be preserved. We have the International & Great Northern running from Houston to the port of the State and we received an enormous amount of help from them. Later Houston and Galveston joined together and decided that they would try to break up this equalization of traffic from Northern Texas to New Orleans. They thought they ought to have a lower rate. Maybe they were right. What I am trying to point out to you is that when they went into that fight to get a lower rate they had the support of the Santa Fe, which did not run to New Orleans, and the support of the International & Great Northern which did not run to New Orleans.

Then the Missouri Pacific comes along and under this existing law acquires control of the International & Great Northern. We had a decision in our case which was in our favor. I say "our" because I was representing Texas ports in that case. Then, on the petition of the New Orleans interests it was reopened; but, in the meantime, the Missouri Pacific had gotten the International & Great Northern, as a result of which the International & Great Northern not only ceased to help us but the Missouri Pacific was against us. Those illustrations are given simply to show that in the preservation of competition a railroad can assist in the adjustment of rates and that there is competition in rates.

Permit me to give another illustration. At Wichita Falls a factory was built to manufacture automobile trucks and they found themselves competing for export traffic through New Orleans with certain territories around Chicago, and in your district, Senator Couzens, served by the Illinois Central. Wichita Falls was nearer to this port than were those points up there, but it was a higher rated level country and they had much higher rates. They said, "We want to get in on that business and be taken care of." The road that was serving them and taking this traffic to New Orleans did not serve these factories up in your country, Senator. So they put in a rate which met the rate from Michigan and the Chicago district on export traffic. It was a competition of rates but it enabled that manufacturer to come in. If they had all belonged to one

company they would have said, "You fellows have got to pay your share of the transportation burden and that is the disadvantage of your location."

This idea of preserving competition in service and competition between carriers in all of its aspects has been all along so thoroughly ingrained in the mind of the public and in the minds of the shippers of this country that they regard it as something of fundamental importance to be preserved.

Senator FESS. Mr. Fulbright, do you think it is not preserved on page 4 of the law? Or are you at liberty to take that up now?

Mr. FULBRIGHT. I am going to get to that, but I will say that it is not.

Senator FESS. I shall not interrupt you.

Mr. FULBRIGHT. I have a suggestion that I will make with respect to that. We think that something nearer the language that we have in the 1920 act would be better.

I want to point this out further: In our judgment, the Interstate Commerce Commission has gone rather far afield in permitting an elimination of competition in some cases even under the 1920 act. Their reason for doing that is that the applications which they have considered are under paragraph 2 of section 5, which provides that the commission on the application of a carrier, or carriers, to the extent indicated by the commission may permit one of these carriers to acquire control of another through a lease or purchase of stock, or in any other manner not involving consolidation of the carriers into a single system for ownership or operation, provided they find it will be in the public interest. Under the next pragraph they had to work out this plan first and not having worked out the plan the carriers make application under this provision here which says something short of consolidation. In construing that the commission has applied the de minimis doctrine adversely; then in permitting the railroads to do something which is in the minds of many lawyers equivalent to a consolidation. But, at any rate, the carriers make an application under this section. There are two lines that are competing for their freight, and they say to the commission that there is not any requirement that competition shall be preserved under paragraph 2 and they are going under paragraph 2. That requirement for preservation of competition is in paragraph 4.

I do not think that Congress meant that the commission could destroy competition all over the country and then later when it got to issue its plan under paragraph 4 would preserve competition as fully as possible. I think one declaration in paragraph 4 was the declaration that would protect the shippers against this very destruction of competition. That in the minds of the shippers is one of the strongest arguments for the passage of consolidation legislation.

We do not think the present law is adequate because of the way the commission has interpreted it in permitting acquisitions of control under paragraph 2 which substantially curtail competition. In some cases they have denied it and competition has been given as one of the reasons but it has not been shown to be the controlling reason.

I might refer to the recent decision in what is known as the Loree application for the unification of Southwestern lines, decided in

May, 1922, in 124 I. C. C. 401. The competition is discussed in that decision in pages 414 to 416, and it probably was one of the things considered by the commission in denying it. But the commission does not consider, apparently, that under section 2 there is a mandate of any character that competition shall be preserved. We think that whatever law is passed by this Congress ought to put that in unequivocal language.

Now, this question of preservation of consolidations and the policy that has been refered to in the previous testimony before you largely emanated from Senator Cummins, whose memory we all revere. The thought was that there were numerous weak lines that were incapable of continuing to serve the public unless some stronger lines should take them under their wings; and there were three or four provisions placed in this 1920 transportation act having in mind bringing about such a result—i. e., having the weak lines taken over by the stronger lines.

One, for example, was the provision by which the commission had broad powers of readjusting divisions between railroad lines. Another was a provision in section 15a, the leveling process prescribed under section 15a, and a third was in this devising of a plan which should take into consideration all of the short and weak lines and take care of them.

I wish to state at the outset that the short and weak line is a popular theme. Many tears have been shed about the short and weak line, but the problem has been grossly exaggerated, as Mark Twain remarked about reports of his own death. With all due respect to Senator Cummins, he reached his conclusions, as his testimony shows, from going over the numerous reports filed by the railroad corporations without going back of them to see whether or not this or that railroad corporation was, in fact, a part of some major system; and he reached the conclusion, and stated before this committee some two years ago, that there were approximately 60,000 miles of lines in the United States that were not and could not reasonably make a compensatory return unless there was some help. His statement had appended to it a detailed check of a number of these railroads which had not for three years earned 3 per cent; and those were the short and weak lines.

After Senator Cummins made public this list I took it up with him and gave him an analysis of some of them, and I hope I may be permitted to refer briefly to the analysis which I furnished to show that he was concerned over a lot of railroads that, according to his own statement, did not need succor.

For example, he classed the Santa Fe and the Rock Island and the Southern Pacific and the Frisco and those major systems of my territory as the stalwart lines that did not need the helping hand of an outsider.

In his report he showed 15 railroad corporations from my southwestern territory with a mileage of 15,342 miles. One of the first he mentioned was the Morgan's Louisiana & Texas Railroad & Steamship Co., which operates 400 miles of lines in the State of Louisiana and which is a main-track division of the Southern Pacific. The next was the Panhandle & Santa Fe, 857 miles in western Texas, which, owing to certain local conditions, did not show up very well that year; but it is a part of the great Santa Fe System, and, by the way,

is one of the greatest money makers in the United States to-day. There was the San Antonio & Aransas Pass Railway, which was already practically owned by the Southern Pacific. They were the guarantors of its obligations and paid its interest bills.

He also mentioned the Trinity & Brazos Valley, 368 miles, owned one-half by the Burlington and one-half by the Rock Island. It never made any money because they have treated it like a stepchild and have fought for the control of it. Then the Missouri-Kansas-Texas with 1,738 miles. There are several like that.

I want to make this observation. The Missouri-Kansas-Texas has about half of its mileage in Texas and half in Oklahoma, Kansas and Missouri. Texas is the great gathering ground for many of its products and a great distributing area for that road. In many other cases in the adjustment of their divisions the Texas lines may make less than they ought to make or more, because they can adjust those divisions as they see fit; but, at any rate, as I pointed out to Senator Cummins in my letter, while he put that road in as not making an adequate return, the parent line that same year that he mentioned had an operating net revenue of more than $55,000 per mile; and, taking the proposition as a whole, it was not in the category of weak lines.

There was a similar situation with respect to the St. Louis Southwestern of Texas, which had 870 miles in Texas and the rest in other States. It made large moneys in the other States as a part of the system.

The next one was the Wichita Falls & Northwestern, with 329 miles. It was a part of the Katy system, a feeder line. The next was the Fort Worth & Rio Grande, a part of the Frisco system, and the Frisco was then one of the greatest money makers in the Southwest. The St. Louis, San Francisco & Texas was another of its subsidiaries in Texas. The only major line that was named by him in the Southwest was the Missouri Pacific, and the Missouri Pacific was weak because it was then suffering the consequences of some consolidations with lines that were weak lines. That is the reason it was weak.

Senator FESS. Mr. Fulbright, those spurs that you speak of if standing alone would not be profitable, would they? But attached to the larger system they would be profitable?

Mr. FULBRIGHT. Senator, I think Morgan's Louisiana & Texas Railroad standing alone would be one of the most profitable pieces of railroad in the world, because it is a connecting link in transcontinental traffic.

Senator FEES. But that would not be true with a great number, would it?

Mr. FULBRIGHT. With respect to some I think it would not be true. You can not lay down one rule to cover all cases. A railroad may be strong even though it is small in size. The Missouri Pacific, which had then 1,571 miles, was going through certain processes which were calculated to greatly increase its strength. They had suffered some ill consequences from having in their organization certain lines which were subject to floods and had not very much traffic.

But I pointed out to Senator Cummins that other things had happened since he read those figures that would make the Missouri Pacific a strong line, a part of which came about by consolidation, too, in this rough sense.

But, at any rate, those lines that I have named comprise 12,435 of the 15,342 miles in the Southwest, and there are similar situations existing in other sections of the country.

The Missouri Pacific later took over, under the order of this commission, the Gulf coast lines. Those are the old system lines that I grew up with, and I am rather proud of them, not that I was to blame for their development, but those lines that went in were the ones that were ridiculed by the Southern Pacific at the start. They could not pay operating expenses. In 1913 they were thrown into receivership. In 1917 they were reorganized and brought out, and they did not have any strong line to back them. They were put on their own initiative and they had to swim or sink. They formed a compact organization. They told their officers that they would have to take small salaries. I know that they gave me, who had been attorney for the receiver, a salary of $250 a month to start with. But in a little while the stock that was absolutely worthless was built up to where it was paying dividends and was selling at over par. Their income bonds that were selling around $30 went up to $90 in a little or no time, and they became a very great money-making road. They never had heavy traffic but they went into that Rio Grande Valley where they originated a lot of agricultural traffic and got the whole of it. Then there was big business between New Orleans and Texas, and they participated and got their shore of that. They built up a good business there, and were strong and the Missouri Pacific took them for the financial strength and the earning power that it would give to them. That was the case of a big road taking over a small line to get strength. Almost the same thing happened in taking over the International & Great Northern. So that in that we realized some benefit.

Now, we say there are many benefits that can come in strengthening a financial structure through consolidations. We do not take issue with the railroads on that. We think those problems as to what they mean can be worked out. The only issue we have is that in the working out of these plans when they come before the commission competition shall be substantially preserved.

Regarding the weak lines, I had compiled some figures for 1926, taking 33 of the largest systems, which included two of the Canadian systems; that is, their mileage in this country only. In the 1920 transportation act it was contemplated by Senator Cummins that there should be somewhere from 20 to 35 railroads systems in the United States, and it has been variously estimated that they should be reduced to around 30.

In these 32 or 33 systems to-day they own 88.25 per cent of the operated mileage of the country. I mean of the class 1 lines of the country. The operating revenues comprise 91.1 per cent; the ton-miles of revenue freight; that is, the volume of freight traffic, comprise 90.3 per cent, and the revenue passenger miles comprise 94.75 per cent.

So that already, through the benefits and the provisions for consolidations, or the lack of provisions for them, we have some 32 or 33 systems owning 88 per cent of the mileage and having over 90 per cent of the business and taking in more than 90 per cent of the cash.

In that I have included some lines or separate systems that were in fact owned by other systems jointly. For example, the Burlington

is jointly owned by the Great Northern and the Northern Pacific. Then there are a few roads which are not included in that statement that are owned by the major systems, such as the Trinity & Brazos Valley, the Spokane, Portland & Seattle, the Galveston, Houston & Henderson, etc. There are others. But those roads also would add to it because they are in fact owned jointly by two or more existing systems that would come within this category.

If the Nickel Plate merger goes through it would reduce the number by three, as the Chesapeake & Ohio, the Pere Marquette, the Erie, and the New York, Chicago & St. Louis would be brought into relationship of being a common system.

So I do not think we ought to consider that bringing about consolidations into a few systems is such a major problem of this country. Of that small remaining group, the small remaining group that Senator Cummins listed there is a substantial number of lines that were plant facilities pure and simple in their construction, and that has been the major purpose of their existeuce. We have a number of them in my country in the great timber areas there. A man buys a tract of timber and puts in a tap line, some of them over 100 miles long. He puts that in to haul logs or forest products. Usually about all the equipment he owns consists of log cars and some power. That is just a part of what he figures on when he goes into that project. A part of his plant is that railroad. It is not put in there to transport the commerce of the public. It is a plant facility for his own product. When he gets all the timber out, he has not very much business left. It may be that in the meantime some communities have grown up there and that there is some service to be performed.

Senator FESS. During the time that business is profitable along the line there may have been communities built?

Mr. FULBRIGHT. That is correct.

Senator FESS. What shall we do about that?

Mr. FULBRIGHT. I do not think that an investor in a railroad ought to be required to dilute his investment by paying to that line more than it is worth. Its value probably is very little. The original owner has probably realized on it a long time ago as a part of his plant facility. The proposed law here takes care of that situation, and I think it is an admirable position and is as far as you can go.

Mr. THOM. You were speaking about something not being a major problem. You meant the weak line?

Mr. FULBRIGHT. Yes.

Senator COUZENS. You also meant that consolidation was not a major problem, did you not?

Mr. FULBRIGHT. I do not think that consolidation is such a problem that Congress should say that there should be consolidations. The shippers do not say that there should be consolidations. They say that consolidations are not going to reduce our freight rates. It will accomplish certain things for the benefit of the man who owns a particular railroad; and, therefore, we think there ought to be a permissive system, and we think that permissive system should carry with it a machinery and the machinery devised in this bill, as I stated previously, an admirable piece of work in that respect. We think Congress should put it through without delay. But we do not want to face the possibility of the thing happening

that is to-day happening under paragraph 2 of having railroads put into one without regard to competition in this country. This situation, we think, it important to correct through legislation.

Senator COUZENS. In other words, you believe that the railroads are fairly well scrambled now inasmuch as 30 railroads have practically 90 per cent of the business?

Mr. FULBRIGHT. Yes. There are a number of instances where great public benefit can be derived by some additional unification. I can think of a number of them myself. I will give you one illustration. The Louisiana Railway & Navigation Co. is a railroad which was constructed from New Orleans in a northwesterly direction to northeast Texas. It was constructed parallel to the Texas & Pacific, an established railroad. It did not reach any big terminals at the northern end. It did not have what I would call very important connections at the northern end. There was no public need or demand for that railroad. A gentleman who had made a fortune in an invention in the wire business conceived the idea that he wanted to own a railroad and he built the railroad. It cost him $20,000,000. He put up the money out of his own pocket. None of the bonds were held by any outsiders. It was his railroad; it was his dream; his fancy. It never made any money and it never will make any money standing alone. As a matter of fact, there was no public need for that railroad because it was so closely parallel to existing lines that were serving the public.

Now, I do not think that the law ought to provide a club or any kind of a compulsion to require some other railroad system to take that investment over. The gentleman who owned that road has passed on. He was a very excellent man. That railroad is for sale now. We can conceive of certain other roads that might use it to a great deal of advantage. For instance, at Shreveport there is a terminus of the St. Louis Southwestern, which operates to St. Louis, Memphis, and Little Rock and goes on down into Texas. This would give to the St. Louis Southwestern a line to the great port of New Orleans.

There is a case where it is conceivable that it would be in the public interest to bring about an acquisition. But, gentlemen, Congress does not want to do that. Primarily that is something for the carriers to arrive at their own trade on and then go to the commission and prove to the commission that it is in the public interest. When they have done that they should be permitted to go ahead, and additional legislation is necessary to enable them to do so.

Mr. THOM. May I ask a question, Mr. Chairman?

Senator COUZENS. Certainly.

Mr. THOM. I think some confusion is arising as to the position of the shippers as it has been presented. My understanding of your statement of what the shippers consider to be of public interest is that a way should be provided of a permissive character whereby proper consolidation shall take place.

Mr. FULBRIGHT. Most emphatically we do want that done and we want it done at this session of Congress if it can be done.

Mr. THOM. You were stating of certain things being major problems. You were not speaking of consolidation not being a major problem, but of the short or weak line?

Mr. FULBRIGHT. I think it is a major problem for this committee to provide machinery in order that permissive consolidations may be accomplished when they are in the public interest. I do not think there is anything you can do that is more important just at this time than to work this out.

Senator COUZENS. As a matter of fact, as far as public convenience is concerned, it is a major problem.

Mr. FULBRIGHT. The railroads are functioning most efficiently to-day. The improvement in the efficiency of the railroads in the last few years has been of the greatest satisfaction to the shipping public. I would like to give you a few figures on that. A question was raised when a similar bill to this one was being considered in the House. The railroads were functioning efficiently and the members of the committee did not seem to think they were. I would like to give you a few figures here of 1927 vs. 1920, taking the first 10 months of each year, because we have not the final figures for last year.

The increase in freight traffic, net ton miles handled, in 1927 over 1920 was 6.8 per cent. The loaded freight car miles in 1927 are 13.9 per cent greater than in 1920. So there are a great many more car miles handled.

While there were more car miles handled, there was a decrease of 2.7 per cent in the freight train miles. They had less freight trains and they handled more business and more cars.

Let us look at some of these percentages because they are very significant. The cars per freight train in 1920 averaged 36.6, and in 1927 46.7, an increase of 27.6 per cent in cars per freight train. The average trainload was increased 9.8 per cent; that is, of revenue freight. The speed of the average trains was increased 19.4 per cent.

Here is a significant factor, and I want to say that the study made traces this from 1920 down to the last year. By combining these factors of trainload and train speed we arrive at the increase in the handling of freight per train hour; that is, how many ton miles of freight are handled in an hour of operation of freight rain. From 1920 to 1927 there has been a steady increase in that number of per net tons handled per freight train hour. In 1920 it was 7,382 and in 1927, 9,652, an increase of 30.8 per cent, and there was a steady increase through all of the previous years.

There are many ways in which this can be demonstrated. I remember making a study for 1925 against 1922 and showing that there was a greater amount of business handled in 1925 for less wage cost than in 1920. So that the railroads of this country are efficiently functioning. There is not any breakdown or threatened breakdown.

Take the car supply. In old times we used to have car shortages and congestions which were expensive to the railroad and to the shipper. The railroads to-day hardly know what a car shortage is. That is not because they have so many more cars and are handling more business. It has been because they operate better. They preserve a better distribution and it has been because the shippers have helped them out.

Senator COUZENS. Do you think there is still room for improvement?

Mr. FULBRIGHT. There is always room for improvement. No matter what business you may be engaged in, there is room for improvement.

Senator COUZENS. Do you think the strides in the next four or five years will be as great as they have been in the past four or five years?

Mr. FULBRIGHT. I do not think so. Here is what happened to the railroads. They had some bad luck, and the best thing that can happen to the most of us is bad luck sometimes, if we do not have too much of it. In 1921 was the general debacle, falling of prices, etc. Business went down to nothing and the railroads were not making any money. In 1920 they were returned to the owners with many problems confronting them and they did not make any money. The year 1922 dawned upon them with high freight levels and the whole country was kicking. The Interstate Commerce Commission, in the teeth of the law, reduced freight rates.

The law said they should be adjusted so as to bring the roads a return, but the commission did not do it. Many things were done. The American Railways' Association has performed a signal operation. They began to work out many of their problems, and I will mention just one of them. They said, "Here are car shortages all the time. We are not getting the best efficiency out of our car supply. Some shippers will order more cars than they need and other shippers will not get any." So they organized joint boards of shippers and carriers in every section of the United States which were known as regional advisory boards. They organized a board in my section of the country that was made up of traffic managers of the leading shipping industries in that section and a committee of the railroads. That committee had authority to say to a man how many cars he could have. Take a fellow operating a sawmill. He would hear that there might be a car shortage and if he needed three cars he would order six. Every other fellow did the same thing.

This regional advisory board, through the assistance of the American Railways' Association, worked out studies to show what the shipping conditions were and what the car requirements were. This committee would say to a man, "You need but three cars and that is all you are going to get." Roughly speaking, that is one of the things that was worked out.

Senator FESS. Mr. Fulbright, is there not a seasonal demand so that at one time in the year there is a demand for a larger number of cars than at another time of the year, and is there at any time a large number of cars standing idle because of no demand?

Mr. FULBRIGHT. Senator, of course, there are times when there are a large number of cars standing idle. That is true.

Senator FESS. That makes the problem pretty serious, does it not?

Mr. FULBRIGHT. It makes the problem serious; and, as to the seasonal demand, of course, the general arrangement between the railroads is such that they shift their cars around over the country as the needs may require, and they pay a per diem on those cars when they are being used by a line that does not own them. For instance, in the early part of the cotton season in my country the lines will begin assemblying off-line cars. The same thing is done in the wheat-growing territory. They will assemble cars in advance of their needs. And that is a part of the work that this regional advisory committee works out. They bring about the shift of the

cars, not after the emergency has arisen, but before it comes, and then we do not have any emergency.

Senator FESS. I would like to ask another question on that subject. I noticed great trainloads of cars with the names of coal companies on them. Do the coal companies own those cars?

Mr. FULBRIGHT. Yes, sir; they own them or lease them.

Senator FESS. That may also have something to do with the coal companies having a supply of cars when their rush is on?

Mr. FULBRIGHT. Yes. You are getting into a subject that is pretty technical now, however. I would be glad to go into it, but I think it is going beyond our investigation.

Senator COUZENS. May I suggest that if you have any major point that you desire to finish this morning, you cover those major points first.

Mr. FULBRIGHT. I will just briefly epitomize some things here.

Senator FESS. By the way, I would like to have you submit that data you have to the clerk, if you are not going to state it all at this time, especially that feature as to the efficiency of the railroads.

Mr. FULBRIGHT. I can give him these figures. With reference to paragraph 1 of section 202, on page 4 of the bill contained in this new print by the law committee of the Association of Railway Executives, it is our thought that that section should be greatly abbreviated and reduced to a very simple provision. It is a rather peculiar thing to put in a law. It seems to be a speech setting forth some of the virtues that may be expected from consolidations. I do not think it is intended by the framers as a mandate, because we have been opposed as shippers to a declaration of a policy that would say that the railroads ought to be consolidated. We have suggested a very simple wording of that paragraph, which would read as follows:

> The unification of carriers or property of carriers through any method or procedure provided for in this title may be authorized by the commission where it finds that such unification is in the public interest, and that it will not substantially reduce existing carrier competition.

Senator COUZENS. What is that a substitute for?

Mr. FULBRIGHT. That is a substitute for this language rigmarole that the unification of carriers is hereby authorized and the commission shall carry out the provisions in this title in such manner as in its opinion will protect the public interest.

Mr. THOM. Your proposal is to put that in place of paragraph 1 of section 202?

Mr. FULBRIGHT. Yes, sir. The next provision concerns the factors to be considered by the commission where they get a petition and here is the way that subject is dealt with: "Prevent any undue lessening of existing carrier competition in service in cases where such competition is deemed by it essential to the public interest."

Now, we say that that leaves the gate wide open. There really is not any mandate on the commission there. When we get to the next part there seems to be mandate because they do not leave all that "deem" in there. They say, "and bring about ultimately the establishment of a number of strong, efficient systems well balanced as between themselves." There is not any "deem" there. That is getting these few big systems together. There is not much difference between that and the plan that the commission has been kicking about.

Mr. THOM. I do not think you are reading that quite right. That is qualified by the words "in its opinion," in line 23.

Mr. FULBRIGHT. Well, then say it is in its opinion. Congress is then saying that this commission shall reroute this railroad map so that in its opinion it will bring about a number of strong and well balanced systems as between themselves, calculated to facilitate simplified and more effective regulatious. I do not know whether it will or not. That is a much debated point and we do not need to argue about that here.

The next words are "to promote economy." There are some economies that will be realized in some cases and in some cases they will not.

Senator COUZENS. In that connection, a very able Senator who had some connection with the railroads said to me yesterday that this whole unification plan was a plan of the bankers and that the operating forces were not so keen for it.

Mr. FULBRIGHT. This section continues as follows: "To maintain as far as practicable the existing routes and channels of trade and commerce, to eliminate unnecessary duplications and wasteful competition." That is, if in its opinion there is wasteful competition they can eliminate it. The paragraph continues, "and to provide the advantages of competition between the systems so established." That is to build up a new competition that does not now exist. That is a rehearsal of what the advocates of consolidation conceived to be the possible benefits that may arrive from consolidation, except that they have not anything in there about reducing freight rates. If Colonel Thom will put in there "reduce freight rates," we might go along with him and swallow the rest of it.

But, seriously, I do not want to be considered as combative here. The rehearsal of saying a commission shall do thus and so in such manner as in its opinion will create a certain number of systems well balanced as between themselves is equivalent to putting on their shoulders the duty to draw up a plan and is something that will be made use of. When a railroad wants to acquire the property of another they go out like they do to-day under the existing law and get the local banking interests and citizens of a little town lined up in favor of the consolidation, and it never is considered from the standpoint of the shipping public by those people. They say, "Congress says we have to consolidate these properties." I do not say that all of them do it. So long as you have these declarations in the law to do so-and-so, such as to make a number of well-balanced systems, some very enthusiastic proponent of the consolidation is going to come into these towns and say, "Now, Congress has said that they have to put these into a few systems. Why not give us this road instead of letting the Rock Island or somebody else have it? They are a bunch of cutthroats and we will treat you right." I have seen that done.

Therefore, we do not like any declaration of policy in the law at all except that the proposed consolidation shall be in the public interest and competition shall be substantially preserved. When you do that it is simple. The carriers are free to make any application they desire to make. They can make an application to put them all in one line. But here is a method of procedure all mapped out in a masterful way and the Commission is to pass on any consolidation put forward. The only thing that we would have you say to the commission is that competition shall be substantially preserved, not entirely preserved because there is going to be some cur-

tailment of competition in almost any consolidation. Two roads may compete with each other to a limited extent; but when we speak of substantial in preserving something we mean in the major aspects and somebody has to use power in interpreting that language. You can not do it. You have created the Interstate Commerce Commission, and you should place the responsibility upon them to do that. It gives to them a discretion. There may be a case where there is some impairment of competition, but they would not consider, taking the problem as a whole, that it is substantial. They will be the judges as to that according to this bill.

That language in the bill says, "Such as in the opinion of the commission will prevent an undue lessening of competition." Now, what does "undue" mean? It is a very poor and indefinite word. Then, it is further qualified, "undue lessening of competition in cases where such competition is deemed by it essential to the public interest." It has to say that the public interest requires that this is essential. We would prefer to have this committee work out a bill which would have in it the language which was put in the 1920 transportation act, which says:

> Competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained.

I have prepared a little memorandum that I might embody here as an alternative suggestion, although I do not know that that is necessary. I think possibly the first one that I gave is a better way of expressing it because it is very concise. This reads:

> The unification of carriers or property of carriers through any method of procedure provided for in this title may be authorized by the commission where the commission finds that such unification has been shown to be in the public interest. It is hereby declared to be in the public interest that competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained.

We have simply used a sentence repeating the identical language used in the transportation act of 1920, which I think was devised by Senator Cummins himself.

Now, I would like to recount to you the action that has been taken by our organization. The first action was taken in this city on January 27, 1922, and at that time we advocated the repeal of that part of the statute which provided for a plan and oppose anything that smacked of compulsion and anything that declared a policy, and we asked that a permissive provision be put in the statute providing that—

> the Interstate Commerce Commission be given authority to authorize consolidations upon application of the interested lines, provided that such consolidations in the jugment of the commission will be in the public interest and will not substantially lessen carrier competition.

That was declared six years ago. We have given consideration to it at a number of annual meetings since and at some of the special meetings in the spring. At the last meeting in Chicago I had before me some editorials of some financial periodicals that were criticizing our organization as blocking the wheels of progress because we insisted on maintaining competition. I called upon the membership or anybody else that would espouse that proposition that we should weaken this language or weaken out stand. The only response was from those that, if anything, would like to make the language stronger. That is because we are in a position to appreciate

the benefit and importance of competition. It costs money but we get the benefits that are worth what it costs.

Several hundred representatives of actual shippers attend these meetings. All of these reports are sent out first to them and then they are gone over thoroughly by a general executive committee that is made up of leading traffic men from every section of the United States, about 40 of them, and they spend two or three days going over these reports before they make their suggestions. So this subject is not new at all.

Senator FESS. Mr. Fulbright, have you any material that you will not have time to use here that you would like to put into the record?

Mr. FULBRIGHT. Senator, I really have not started, there is so much that could be said on the subject; but there are a few salient points that I would like to cover in a memorandum if there is not to be a subsequent meeting of the committee. I think those points could be dealt with, perhaps, in a memorandum.

Senator FESS. On that point, Mr. Chairman, there are parties who want to be heard but are not ready to appear this afternoon. It may be necessary for us to change our plan, as we had intended having a committee meeting this afternoon.

Senator COUZENS. I think the suggestion of Mr. Fulbright that he file those papers for the record would cover the purpose, because the committee has a very small representation this morning.

Senator FESS. Inquiry was made as to whether we might have an afternoon meeting next week, say, on Tuesday, to hear parties who are already in the city.

This committee will have under consideration Monday the Walsh resolution which will displace the one now under consideration. If we could have a meeting on Tuesday afternoon we could hear these people who have come here.

Mr. FULBRIGHT. I think it is important to hear from these short-line representatives. We want this bill passed. There may be some things that we would want to change in it, but action ought not to be delayed.

Senator COUZENS. I do not think we ought to commit ourselves to any meeting at this time. When Senator Watson, the chairman, comes back, we can confer with him about it.

Senator FESS. We can say to the short-line people who wish to be heard that we will give them an answer on Monday as to when they can appear before the committee.

Mr. THOM. Mr. Chairman, you will recall that at the conclusion of the statement I made a few days ago Senator Sackett expressed the desire to have some man acquainted with operations come here and make a statement about the desirability of consolidations. I have arranged for one of the outstanding operating men of the country, Mr. Aishton, to come here and make that statement. Mr. Aishton is president of the American Railways' Association. He can not in all probability be present after this coming week, and that makes me concur in the application that you will arrange for some hearing in the afternoon, if possible, during the coming week.

Senator COUZENS. We will adjourn now to meet at the call of the chairman.

(Thereupon, at 12 o'clock noon, the committee adjourned to meet at the call of the chairman.)

CONSOLIDATION OF RAILWAY PROPERTIES

SATURDAY, JANUARY 21, 1928

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to call, at 10 o'clock, a. m., in room No. 212, Senate Office Building, Senator James E. Watson presiding.

PRESENT: Senators Watson (chairman), Couzens, Fess, Sackett, and Pine.

The CHAIRMAN. The committee will be in order. Mr. Daniel Willard, president of the Baltimore & Ohio Railroad Co., is here. Have you a statement to make, Mr. Willard?

Mr. WILLARD. Shall I be sworn, Mr. Chairman?

The CHAIRMAN. Oh, no, sir.

Mr. WILLARD. I have no prepared statement, Mr. Chairman, for I have been very busy and have not had an opportunity to do it. But I am somewhat familiar with the problem you have under consideration.

The CHAIRMAN. Have you read this modified bill?

Mr. WILLARD. I have.

Mr. ALFRED P. THOM. Mr. Chairman, may I state this before Mr. Willard begins his statement, so as to explain something that happened during your absence?

The CHAIRMAN. Certainly.

Mr. THOM. At one of the sessions of the committee Senator Sackett said that, speaking for himself and he was sure for one or two other members of the committee at least, he would be very much interested in having some man with executive responsibility and with executive experience in the management and operation of railroads to come before the committee and explain from that service standpoint the advantages of consolidation. It is in view of that request that Mr. Willard is now appearing here before the committee.

The CHAIRMAN. We are very glad to have him, and the committee is always glad to hear Mr. Willard.

Mr. WILLARD. I thank you, Mr. Chairman.

The CHAIRMAN. You might just take a seat right there and we will be glad to hear your statement.

STATEMENT OF DANIEL WILLARD, PRESIDENT OF THE BALTIMORE & OHIO RAILROAD CO., BALTIMORE, MD.

Mr. WILLARD. I had not expected to appear here at all with reference to this particular bill, because that is a matter that I have not studied. I assume that the purpose of the bill, however, is to

promote consolidation under such terms as Congress shall think wise, and that is rather a matter I presume for statesmen and lawyers than for men with my lack of legal knowledge. So I have no particular views concerning that bill if it does what I understand it is intended to do.

There is one slight modification under the question of policy that I perhaps will refer to, but I had been giving thought in the last two or three days to the question that was propounded as I understand by Senator Sackett that I should come here rather to talk about the advantages of consolidation as I see them.

It has not seemed to me that consolidation raises any new or untried policy. On the contrary, it seemed to me that when Congress passed the transportation act and included therein a statement of policy, and it was hardly more than that, favoring consolidation, that Congress must have been acting with full knowledge of what had happened in the past. They must have known, of course, that we had in the country such systems as the Pennsylvania Railroad Co., the New York Central Railroad, the Burlington Railroad, and the Sante Fe Railroad, to mention just a few; and they must have known that these systems, as they are, are all the results of consolidation, just as is suggested in this bill. It has been frequently referred to, and I think that Colonel Thom in his statement went into the matter, and so I shall not go over it again, but there were a number of little short railroads formerly that now make up the New York Central, and, as to the Baltimore & Ohio——

The CHAIRMAN (interposing). How many were there that went into your own railroad?

Mr. WILLARD. There were originally 154 separate companies that have gone into the Baltimore & Ohio system, but we have reduced that now to about 40. Yet they have been so unified and brought in that we really have only three companies that make reports to the Interstate Commerce Commission.

The CHAIRMAN. How much of that consolidation had occurred before the passage of the Esch-Cummins Act?

Mr. WILLARD. Practically all of it. There is just one addition, of 325 miles, in Indiana, the C. I. & W. Railroad, that you may be familiar with, Mr. Chairman.

The Chairman. I am.

Mr. WILLARD. That has been brought into our system and unified with our system under the transportation act as it now is. But that is the only thing that we have done.

The CHAIRMAN. All right.

Mr. WILLARD. I have assumed that knowing, as Congress did, of the Pennsylvania Railroad and the New York Central Railroad and the Santa Fe Railroad, it thought it was desirable to have more systems of that kind instead of a large number of shorter, and not always weaker but sometimes weaker railroads as is so in many cases.

So that consolidation from my point of view is in no sense an experiment. It is a very much tried out principle and has to its crdit some very satisfactory examples in these great systems I have already referred to.

To be more specific as to some of the advantages that accrue through consolidation, of course it will be evident to anybody that if one line, like the Baltimore & Ohio, operates through from Baltimore to

Chicago, it is possible to arrange train schedules, engine runs, and all matters of that kind with less duplication and less expense than would be the case if, as was formerly true with us, there were six different companies.

When I was running a locomotive, quite a good many years ago, as conditions then were a run for an engine was perhaps 40 or 50 miles, and very rarely if ever did engines run straightaway more than 100 miles. As a matter of fact, they were not equipped then to do it. But to-day, with automatic oilers, automatic stokers, and different improved appliances of all kinds, such as have been brought out, including the superheater, it is easily possible and practicable to run engines 200, 300, 400, and even 500 miles, and I recall one instance on the Southern Pacific where the run was for 800 miles, from Los Angeles to El Paso.

Certainly it would be uneconomical and could not be justified to continue to run to-day with our locomotives, for instance, changing every short distance, as was the case some years ago. But we are all more or less under the influence of that earlier practice. To-day we have many runs on the Baltimore & Ohio where engines are changed every 100 miles or so. We have not yet been able to bring about such changes as would justify longer runs. Sometimes small communities would be quite seriously affected by such changes, because railroad shops would have to be abandoned, and that can not be done violently. It is a process of adjustment, of course. People live there have their homes there.

But we are arranging, as we know in our own system, to extend engine runs to a minimum, say, of 200 miles; and to-day we are running 230 miles from here to New York. The Pennsylvania Railroad has been doing that for a long time. But we could not do it because our line only extended to Philadelphia, but later on, owing to our interest in the Reading, having a substantial interest in it, we were able to work out arrangements so that our engines could run through to Jersey City, as they are doing to-day.

Our figures show that whenever we save the handling of an engine, and by that I mean cutting an engine off at a division point, cleaning out the fire and putting it into a roundhouse, and then taking it out and putting it on a train again, the minimum cost for such an operation, even if there are no repairs to be made, is about $17. So that when arrangements are made to cut out intermediate terminals there is immediately a very substantial economy.

That is best promoted by a consolidation such as this bill provides. There are doubtless many cases in point, but I have a very definite case on the Baltimore & Ohio which has just come about within the last five or six months. The Baltimore & Ohio Railroad gives to the Western Maryland about 400 cars, mostly coal, a day at a point called Cherry Run, on the Potomac River, probably 100 miles from here. That coal goes over the Western Maryland Railroad to the Reading, and then it goes over the Reading to the Central Railorad of New Jersey, and over a piece of that railroad to the Lehigh & New England, and over that road into New England, some of it, and much of it is dropped along in between.

Formerly in handling that coal we took the loads to Cherry Run, and left them there in a small yard provided for that purpose. Then the Western Maryland would come there with its engines and take

the loads to Hagerstown, or perhaps to Shippensburg, on the way to Harrisburg and into the interior. About six or eight months ago we arranged with the Western Maryland so that we would run those cars with our engines in our trains from Cumberland, say, on the Baltimore & Ohio, through Cherry Run without stopping and on to Hagerstown, which is about 20 miles beyond.

The first effect of that was that it saved a delay of anywhere from 6 to 12 hours to the business at Cherry Run, because trains did not stop there any more. Then under the arrangement for paying the trainmen: Our men previously got paid as much for going to Cherry Run as they would get for going to Hagerstown, because in both cases it was less than 100 miles and we had to pay them for a day anyhow. There was the saving in expense, and there was the saving of turning the engine at Cherry Run, and there was a very considerable saving in time.

We have estimated that on the buisness that moves through that one terminal we have saved enough in fuel and in wages of train and engine men, and in taking off inspectors which are no longer necessary for we formerly had at the point of interchange, Cherry Run, a corps of inspectors to keep records of cars passing between the two railroads.. We have been able to eliminate that. So that with all the changes that we have been able to make under the new arrangement we estimate the Baltimore & Ohio saves about $150,000 a year. And the Western Maryland tell us that they will save even more on their part of that work. So that it is not only more economical but it expedites business and gives better service to the public whenever railroads are able to do anything of that kind.

Senator SACKETT. And that has been done without consolidation?

Mr. WILLARD. Yes. I might say this, however, that it was done with the consciousness that consolidation might come about.

Mr. THOM. Have you any interest in the Western Maryland?

Mr. WILLARD. Yes; I was just coming to that. Some months ago, as is perhaps a matter of general knowledge, the Baltimore & Ohio bought a rather substantial interest in the Western Maryland. We did that because we believed that in the ultimate grouping of railroads these two lines would be put together, and it so happened that the interest we bought was about to be sold, and we felt that we could buy it cheaper then than we could ever buy it again, so we thought it was to our interest to buy that stock and hold it awaiting the final determination of this consolidation matter, and if the Interstate Commerce Commission approved of our having that interest we would already have it. That was all there was to it. And if the Interstate Commerce Commission did not approve of it, we could dispose of that interest.

Because of that arrangement, and because the Western Maryland had completed some arrangements, we were able to go ahead and work out this plan, and it was to our interest to do it, although we never had done it before and the same junction has been there for 30 years. It was done under the influence of consolidation, the belief in it, the expectation that it was coming, that it was worked out. And that is not saying that we might not have worked it out even without that influence, but the point is, that without it it is more difficult to work these things out, more questions are involved, and usually these things have not been done.

We have been moving our passenger trains from Washington to New York over the Reading Railroad north of Philadelphia since 1886, but it was only inside a year that we arranged to run our own engines through to Jersey City, and save the expense of handling at Philadelphia, save the delay of changing engines, and altogether make a much better and more economical arrangement.

We might have done it, as you say, but we did not do it for 30 years, and I rather fancy that when we did do it there was present the rather unconscious expectation that consolidation was coming about, and that the Reading and the Baltimore & Ohio would be ultimately put together, and that set us to studying the possibilities, and among them we found this possibility and put it into effect.

Senator FESS. Mr. Willard, you put on a new service of through freight from Springfield, Ill., coming through Dayton, Xenia, and Chillicothe?

Mr. WILLARD. Yes, sir.

Senator FESS. And one of your men was telling me the other day of the number of hours you saved by that.

Mr. WILLARD. Yes; and I am glad you mentioned that, Senator Fess. I will elaborate on it a little more, if I may, because there has been brought about unification under the existing act.

Senator FESS. We would be glad to hear it.

Mr. WILLARD. We have not made any money out of that as yet, but we hope to, eventually. The only party that has gained as yet has been the public. That road from Indianapolis, or rather from Hamilton to Springfield, is an independent company, weak and poor; the property was poorly maintained, and when we took it over a a year and a half ago we were asked to inaugurate through service from Springfield on to Washington, which we have since done. We could not do it then because we did think it was proper; did not think it would be safe to run such trains as we wanted to run. So the first year we had it we increased our expense of maintenance over $600,000. But the Baltimore & Ohio was able to do it. The C. I. & W. of itself was not able to do it. We did not earn the interest on that particular investment that year. Neverthless, we spent the money on it. In October of this last year we did put on a new through service from Springfield to Washington—that is, with the sleeper coming clear through—and the train is just as good a train as any of our main line trains barring the all-Pullman trains. They have steel cars, dining cars, chair cars, sleepers—a first-class service from Springfield through Indianapolis and on to the East. But it does not pay and we did not expect it to pay when we inaugurated it, but we think it will pay eventually. Of course we had to install it before the people would know about it. While the business does not pay as yet, it does open up a new combination that had not been effected before. It will when used for freight reduce the time of cars moving east a number of hours. It will establish a competitive line that, in our opinion, will pay, but we realize it takes time to do it.

You might ask the question: Why didn't you do it before? The line was there. That is true, but the C. I. & W. corporation did not have the money to do it with. They could just barely pay their interest and keep out of the court's hands anyway, and so they were just going along as best they could.

Senator FESS. There is no doubt that the change has been of value to all that section over there.

Mr. WILLARD. Oh, yes; decidedly so. It is not as good as our main line, of course, and the business would not justify such a line, but it is to-day in as good condition as our best branch lines. It is in condition where we are maintaining a schedule; that is, that we run 45 miles an hour with heavy passenger trains and heavy engines, and, of course, that permits of any necessary movement of freight on a road of that kind.

Senator FESS. It demonstrates the theory that while a certain spur might be unprofitable while it is acting alone, yet when attached to a through line it will become profitable.

Mr. WILLARD. We expect that that line will become profitable ultimately. As bearing on that same point, if you care to have me further elaborate it, I might refer to another instance that I had a personal connection with when I was an officer of the Burlington Railroad.

The CHAIRMAN. The committee would be very glad to have it.

Mr. WILLARD. It so happened that there was a railroad in southern Illinois running from Jacksonville down to Herrin, about 100 or 125 miles long. That railroad was built by the farmers and other people in that vicinity, poorly built and decidedly unprofitable. It did not render any service worth while, and did not earn any money for its owners. But it did pass through Christopher and Williamson Counties and down into a very rich coal field.

Mr. Hill, who was interested in the Burlington at that time, believed that if the coal in those counties could be moved up to St. Paul, at a rate that would be necessary, there could be a market developed for a large quantity of tonnage. The Northwest at that time was getting all of its coal from West Virginia and Ohio, by way of the Great Lakes and Duluth and down that way. Mr. Hill had been in the coal business and, naturally, that interested him. With that background it was arranged that the Burlington Railroad should buy the Jacksonville Railroad from Jacksonville to Herrin, and I was there at that time. The first time I tried to go over the road on an inspection trip we only went 15 or 20 miles when the engine got off the track. It was soft, the ties were old, and the track was not fit to do business on. That is no criticism of anybody, possibly, who handled the railroad, for they did not have the money, and did not have the business to make money, and that was the situation.

After studying the matter and learning at what price coal could be mined and put on cars, and the price at which it had to be sold in St. Paul in order to compete with coal from West Virginia, it was apparent that in order to establish a movement of it up to that point the railroads would have to carry it at a rate of 2½ mills per ton-mile, which was an extremely low rate even at that time. It could not be done with the railroad as it was. So while I was an officer of the Burlington we spent a good many millions of dollars rebuilding that road that we purchased south of Jacksonville, cutting grades from 1 per cent to three-tenths of 1 per cent, and improving the Burlington line in places north of Jacksonville, so that after three or four years' constant operation we had a line extending from the Ohio River at Metropolis north to St. Paul, with a gradient against northbound business of three-tenths of 1 per cent; that is, 15 feet

in a mile, with the exception of two short hills where pushers were used, well maintained and in good shape.

There was, then, a railroad that could handle the business economically all the way. And, then, when that was done, a rate of 2½ mills per-ton mile was put in, and the business began to move.

Perhaps the most illuminating statement that I could add to that situation would be this: I left the Burlington Co. at the stage of the development that I have mentioned. I learned some 8 or 10 years afterwards that the development had been so great in that region that it had been necessary to build a double track for much of that railroad that we bought as single track and not safe to run anything on at the time.

There is, I think, another great example of the benefit of consolidation—of getting the influence of the stronger line behind the weaker line. And not only was the Burlington benefited, because it gained from that newly acquired line a tonnage which moved over its own railroad for about 400 miles, where it already had a railroad without much business, but by taking on this new line and putting on rates that would permit traffic to move it developed a business that was highly profitable to the Burlington and made a paying line out of an unsatisfactory line, and made broadened markets for coal operators down in that region.

These two concrete examples as it seems to me are evidence of some of the advantages of consolidation.

Senator SACKETT. These instances that you cite I think are most illuminating. They are really the addition of feeder lines largely to existing systems.

Mr. WILLARD. These two lines that I refer to are more or less that, but not wholly so.

Senator SACKETT. The bill which we have before us now contemplates a rearrangement of the railroad structure of the country into further great systems.

Mr. WILLARD. Yes, sir.

Senator SACKETT. For instance, like the Baltimore & Ohio system. The question has been asked; what will the advantages of that matter of consolidation be as compared with the disadvantages to the public of the elimination of certain elements of competition which now exist? And then the theory has been advanced that the very things you speak of, the taking up of feeder lines and adding them to the present systems that exist, would be most valuable and can be done under a very different structure of law than is contemplated here, and still maintain the competing systems, which are an advantage to the public in some respects, and that it is not necessary to go into a very general consolidation; that there are not material advantages in going to that extent of a very general consolidation of the railroads, a tremendous work; that it is a costly work to bring about; that it is a work that when you come to issuing new securities upon these consolidated systems, that in taking up the individual lines, there must be considerable loss through underwriting and expenses of that kind. Is there a great advantage, and I ask you particularly from your operating standpoint, in bringing about that class of consolidation?

Mr. WILLARD. Yes; I think there is. I intended to refer to that but we got started on the other line first.

Senator SACKETT. I appreciate that.

Mr. WILLARD. Perhaps we started on the line of least importance.

Senator SACKETT. No; I do not think so.

Mr. WILLARD. But we did get started.

Senator SACKETT. And it gave us a picture of that particular situation, which is very illuminating.

Mr. WILLARD. I have though that perhaps you would rather have me support my views by giving concrete examples than by making a general statement.

Senator SACKETT. Yes, I think that is a good idea.

Mr. WILLARD. And I shall do that so far as I am able. There is one difficulty, that you will doubtless appreciate, and that is as to making any direct, definite estimates of savings to be had by consolidation of considerable sized systems, when the lines are now independent and when the Baltimore & Ohio, for instance, has no definite knowledge of the operating practices of the other line that might be consolidated with us; and neither do they have that knowledge about our line. So it is largely conjectural as to what will happen, and no one is in a position to make a definite statement as to the economies to be realized, unless he is in a position to have a full understanding of what is already going on on the lines to be put together. I have not that knowledge. But even so I have some concrete examples that might be illuminating.

Senator SACKETT. I am sure we would be glad to have them.

Mr. WILLARD. We of the Baltimore & Ohio have thought that if consolidation is to be had in this eastern region, for instance, in accordance with the general policy contained in the transportation act, that the Baltimore & Ohio and the Reading and its subsidiary, the Jersey Central, should be put together. Professor Ripley recommended that, and the Interstate Commerce Commission recommended it in its tentative report, and that would seem to be logical inasmuch as we have used that line one way and another as a connection to get to New York for the past 40 years.

If the Reading should be put up with the Baltimore & Ohio, and if one or two other small sections should be put into the same system—and I have not a map that you might visualize it, but that is really not necessary, because a statement I think will make it clear—then that would give the Baltimore & Ohio an opportunity to work out a new route from Chicago to New York without going through Pittsburgh and Baltimore, as we do now.

Our business from Chicago would come as far east as some little distance this side of Youngstown, to a place called New Castle. Then instead of following our line through Pittsburgh, it would turn to the north and come over a piece of the Buffalo, Rochester & Pittsburgh Railroad, over a short trackage arrangement with the Pennsylvania, and then on to the Reading tracks and thence through to New York. The lines are all there now, some of them quite unimportant and with very little business.

Such a combination as I have referred to, and which would be immediately practicable if consolidation should be had, such as I have suggested, would open up a new through route from Chicago to New York 100 miles shorter than the route we are obliged to use now. The tracks are all old roads, and 80 per cent of it is double-track, so it is well on the way toward completing a through line.

That line would do something else besides save us the expense of hauling freight a distance of 100 miles shorter than we do now, and I must bring to your thought some other problems that are constantly confronting the railroads: Pittsburgh, as you know, is a very large producing center, and our facilities must be constantly enlarged in order to haul in and out of Pittsburgh, and there is little doubt that the business will continue to grow. At times our tracks through Pittsburgh are much congested. We have known for a good many years, for we have foreseen it during the past 20 or 25 years, that sooner or later we would have to get a relief line around Pittsburgh in some way, so that our main business to the East, and to Chicago and the West, would not have to go through that terminal. We have had lines surveyed, we have bought some property, and we are prepared to meet that situation when it arises, and it will cost a lot of money to do it. But, happily, this scheme that I have mentioned, if consolidation should be brought about, would solve the Pittsburgh problem. It would take that business out of Pittsburgh, and not only take it out of there but save 100 miles in distance, which is a much better relief to Pittsburgh than any other scheme we have been able to work out.

Senator SACKETT. But that could not be done without the consolidation bill.

Mr. WILLARD. No; that could not be done. Now, there is a very direct and concrete example, I think, of the matter that you have in mind.

The CHAIRMAN. You think, then, that economies would be effected as a general proposition by consolidation?

Mr. WILLARD. Oh, I am quite certain economies would be effected. I am not able to tell you concretely what would be saved, because I have only two definite examples. In the one case, as I have already told you, we know that we are saving $150,000 a year, and the other railroad that we are working with is saving as much and even more. In the other case unfortunately so far we have not saved anything, but the public has had the benefit, and anyone familiar with it will tell you that the public is being much better served than before we started. And eventually I think it will pay us out. As a matter of fact, there have been savings effected there, although it has not as yet been reflected in our net earnings. We have been able to consolidate shops and rearrange runs, so that the actual operation is really being done cheaper than it was before. Overhead expenses have all been eliminated. But we have spent very much more money improving it, with the net result so far that we have not made anything, but we hope it will eventually pay.

I might also say, and Colonel Thom has heard me say this in other hearings although I had forgotten to mention it here, that on that new line which we would develop if consolidation should be worked out along the lines I am speaking of, we would not only have a line 100 miles shorter from Chicago to New York than we have at the present time, but that the highest spur of the Alleghenies we would cross would be about 1,500 feet whereas at the present time we cross at a height of 2,250 feet. So we would save about 750 feet in elevation in crossing the Alleghenies. That would be an additional saving, in the matter of elevation.

Senator SACKETT. That particular case would not indicate that there would be any loss of competition at all to the communities along the line?

Mr. WILLARD. No; there would be an increase in competition.

Senator SACKETT. But there are statements in our record that a general consolidation of these systems into very large units would bring about a certain loss of competition in various sections of the country by the elimination of competition of the railroads combined. Do you get any reaction on that?

Mr. WILLARD. Well, I am thinking as you are speaking, and I am thinking with special reference to the eastern region with which I am more familiar, that is, east of the Mississippi River.

Senator SACKETT. That is fairly well consolidated right now, except by adding these smaller lines.

Mr. WILLARD. It is fairly well consolidated. But there is opportunity for very much more in this region. And in connection with your question there comes to mind an experience in connection with the city of Baltimore. To-day Baltimore has three railroads, the Baltimore & Ohio, the Pennsylvania, and the Western Maryland. The Western Maryland is a freight railroad primarily. It has no through passenger trains anywhere. It only runs one passenger train each way a day over its entire line, so that the passenger service it gives it very slight. It handles coal and low-grade freight. It is a single track line with very bad grades. That is a line that I had said I thought out to be put with the Baltimore & Ohio. When that matter was first discussed the people in Baltimore thought they were losing competition, and they were disposed to be opposed to such an arrangement. They engaged Dr. Emory Johnson, professor of economics of the University of Pennsylvania, to come to Baltimore and study it. He is a man of eminence in his profession. He studied the question and they appointed committees of the Chamber of Commerce to study it. They finally reached the decision that if there should be consolidation in the East and a four-party arrangement worked out, as has been recommended by some carriers, they would prefer to have the Western Maryland put in with the Baltimore & Ohio.

That action was almost unanimous, not quite, as there are some people who still object to it. But they thought it would be better if some other line could connect with the Western Maryland and come into Baltimore. My position has been this: That two strong lines like the Pennsylvania and the Baltimore & Ohio will afford much better and much more effective competition than a greater number of weaker lines unable to meet the conditions that the stronger ones can meet. I felt that Baltimore would be benefited by putting the Western Maryland with the Baltimore & Ohio, providing the Baltimore & Ohio is rounded out so that it gets into more regions, into more tonnage producing territory, and into more markets; that Baltimore will be benefited by that rather than injured. And I think the people of Baltimore have come to that point of view.

It may be that that does not answer what you have in mind, Senator Sackett, but it touches it in that one instance.

Senator SACKETT. I had in mind or the idea of railroads, say, in Texas or Oklahoma, where two pretty good sized roads will run through the same city, and it would be contemplated to put them into one system, and that cities or towns would not have the benefit of competition between those two railroads, because they would then be under the same management. Whether that would be such a public detriment any way as to overcome the benefits in economy and in other lines of service that would come about from consolidating such railroads, I take it is a matter to be considered. There are many cases of that kind in the country at large, I understand.

Mr. WILLARD. I suppose so, and still I suppose the number of places of that kind served by two railroads is relatively small in terms of percentage. Would not you think so?

Senator SACKETT. Perhaps so.

Mr. WILLARD. I am somewhat familiar with conditions, in Texas particularly, but I can not give you an concrete answer to your question, except that my impression is that the thing you think might possibly happen, and that happened I remember distinctly on the Burlington, might be this: There was the station of Kewanee, Ill., one of the best stations on the Burlington. There was no other railroad there at all. It is no secret now, if it was then, that it was the effort of the managers of the Burlington Railroad to give Kewanee the best service they knew how to give, so that they would not become impatient and want another railroad there to divide the business. We have a case in West Virginia where one of our cities is a fine town. We are particularly anxious to serve it well, because we would rather do all its business than some of its business, and still I know very well that if I lived there, and if the city got good service, as it does, I might have the view that another railroad would be a good thing. And yet with a splitting up of the business it is just possible that there might not be quite the same opportunity for as good service, and so I do not see why I should want another railroad.

Mr. THOM. May I ask a question at this time, Mr. Chairman?

The CHAIRMAN. Certainly.

Mr. THOM. This bill provides in connection with the subject that Senator Sackett is asking about that authority shall be given to a public body to weigh the disadvantages of discontinuing the competition he refers to against the advantages in other directions and determining the question by the balance that they find to exist in those matters. Is that, in your opinion, a wise way to handle the subject?

Mr. WILLARD. I do not know just how that technique would be applied in any given case; but I am very confident in my own mind that the advantages of consolidation as a whole would very greatly outweigh any possible disadvantages in detail.

Senator FESS. Take the Northwest, Mr. Willard. There are three great lines and a good deal of agitation for consolidation there. I can not conceive that under the law as proposed the three would be permitted to go into one, but there might be two of them go together and maintain a competing line.

Mr. WILLARD. I am not familiar with that particularly. But here in the East I will say that in trying to work out a voluntary solution of the situation east of the Mississippi River some of the principal carriers tried to develop a plan that would have four groups. There was a very definite reason for that, and perhaps I should say so. There are 56,000 miles of railroad involved in that region. Half of

that mileage is already in two groups, the New York Central and the Pennsylvania. They have done before the law what Congress now gives its seal of approval to. Ovbiously, if half the mileage is already in two lines, if you make more than two lines of what is left, they will each be proportionately smaller, and we thought it would be better to keep them all evenly balanced.

The CHAIRMAN. What other kind of competition have you in the railroad business except competition in service?

Mr. WILLARD. We have not any. There is no competition in rates. But what I was going to add to that—and it is the meat of it all—is that we were careful to arrange it so that every city or community of importance had at least two railroads under this new plan.

Senator COUZENS. With respect to what the chairman said, the league of shippers was here the other day and pointed out many instances of competition outside the mere competition of service, and if you will look up the record you will find that the gentleman speaking on behalf of the shippers made some very definite statements and pointed out some very concrete cases of even competition in rates because of communities desiring to get a part of a certain business, which resolves itself into even a rate reduction.

Mr. WILLARD. Senator Couzens is correct in that. I made my answer a little too embracing, and I will elaborate a little, but he is quite correct. It is really only in a rather unimportant amount, and as time goes on that is going to get leveled out. It is a fact that railroads, in order to strengthen the position of shippers on their lines, may inaugurate rate reduction. Of course, they can not put it into effect unless the Interstate Commerce Commission approves it. They can not, as they formerly did, go ahead and reduce rates. It is recognized that generally rates must be the same over all lines in a given area, but where two lines serve different points some distance apart, there is always a conflict as to what the relation should be. But that is becoming more and more to be a matter to be settled by the commission, and ultimately it will come altogether out of the hands of the railroads. However, I would not wish to be thought as minimizing the points of competition of service. I think that is most important.

Senator COUZENS. I agree, but I also think there is great possibility for competition in rates from different communities. For example, as I understand, Michigan now has a case before the Interstate Commerce Commission with respect to rates on hay desiring to reach a certain field. Competing railroads desiring to reach that field in the shipment of hay try to give rates which will get the business. That brings them into more or less competition for the business of a certain district.

Mr. WILLARD. There may be something in that, Senator. I should be disposed to think, to divert just a little, that the chief trouble with the raiser of hay is that automobiles do not eat hay. That has affected the hay market along our line. Where they formerly had large warehouses for accumulating and holding hay, that situation has all gone. There are some slight instances, although I think they are relatively unimportant, and they will eventually all give way as a result of the adjustment by the commission itself.

Senator COUZENS. This question may not be apropos of this discussion, and if it embarrasses you in any way do not answer it. I

do not get in mind from reading the press what the controversy is between Mr. Loree and Mr. Loomis with respect to certain railroads. Is that a matter of public interest or just a matter of pride and competition between railroad magnates?

Mr. WILLARD. Well, discussing it will not embarrass me any. The situation sometimes embarrasses me.

Senator COUZENS. I would like to get the meaning of it.

Mr. WILLARD. That is a difference of opinion, Senator.

Senator COUZENS. With regard to the acquisition of certain railroads in a combination?

Mr. WILLARD. Yes. Mr. Loree felt that this eastern situation could be better solved by having five groups rather than four, as I have suggested. Certainly he had a right to his opinion as I had a right to mine. Then he proceeded to outline a picture showing how the thing would be developed if his plan were adopted, and it so happened that most of the others did not agree with him about his plan.

Senator COUZENS. Would not that plan be involved in the suggestion you have of making the run from Chicago to New York a hundred miles shorter? Would not some of those systems be involved in that plan of yours?

Mr. WILLARD. Yes; if his plan should be adopted we would not have that line 100 miles shorter from Chicago to New York.

Senator COUZENS. So all those questions of the desirability of combination and the best way to serve the public would be finally decided, under this bill, by the Interstate Commerce Commission?

Mr. WILLARD. Certainly. There should be some Government representative.

Senator COUZENS. And so the mere acquisition of the stock, such as has been attempted by different railroad magnates, would not have any influence on the situation?

Mr. WILLARD. That is quite right, Senator; and, as I explained before you came in, including myself for the purpose of this discussion in railroad magnates but for no other purpose, we bought a substantial interest in the Western Maryland stock, I suspect about as large a percentage as Mr. Loree has in the Lehigh, but we did it conscious of the fact that we could not hold it until the commission found it in the public interest to do so, and we advised the commission unofficially what we were doing.

Senator COUZENS. Supposing that after you had acquired this stock in the Western Maryland the commission had declined to approve it. What position would you be in then?

Mr. WILLARD. We would have to sell it to somebody, I suppose.

Senator COUZENS. That is one of the questions that has arisen here a number of times. Would you be in a position to hold up a combination because of asking an unreasonable price for your stock?

Mr. WILLARD. I suspect that as the law is now we could.

Senator COUZENS. That has been a very debatable subject during all of our hearings, as to just how far stockholders might go to defeat a combination that they did not approve.

Mr. WILLARD. I suspect that we could, although there is this to be said on that probelm, which would settle a good many questions. For instance, we are anxious to secure the approval of the commission to bring about a consolidation between the Reading and the Balti-

more & Ohio. We think it is in our interest; we think it is in the public interest; we think it is in harmony with the spirit of the act. We are anxious to have that done, but we can not do that without the approval of the commission. The commission might very well say, and probably would say, "We think this is a good thing, but how about the C. I. & W., which is not any good?" We expected, as a matter of fact, that if consolidation did come about that would be exactly what the commission would say. That is what I would say if I were in their place. And so when we had a good chance to buy the C. I. & W. we bought it and did not wait for that contingency to arise.

They might say, "We will approve of your having the Reading provided you sell your Western Maryland stock to somebody else." The chances are we would not have any trouble in agreeing, because it looks as if we would have a profit in it anyway. So there is that pressure that the commission has got. I think that would be sufficient for most of the cases that would arise, but as a matter of definite answer, no, you could not force anybody to do the things you say under the law as it now is.

Senator SACKETT. Do you think the chief advantages of consolidation lie in economy of operation?

Mr. WILLARD. No; I do not. Regardless of the economy, and I think that will be very great, I think the chief advantage is what the public, we will say, gets to-day by having a combined New York Central Railroad instead of 15 or 20. You could not conceive of the Twentieth Century Limited operating as it does with dependability and safety over a dozen or a half dozen independent lines. Now, certainly that is a good service for the public. The public shows that by the way it patronizes it. The freight service is certainly more dependable and prompt over lines of that kind.

Then there is another phase of the problem that I think is worthy of consideration. It was my privilege for a number of years to enjoy Senator Cummins's friendship, and I think confidence, before his death, and I talked with him about this matter many times. I know that he felt that consolidation of the kind that he had in mind was important, not to say necessary, in order to simplify the processes of regulation and rate making. In fact, he could not see how it could very well be done without bringing them down. We have 174 Class I railroads to-day earning over $1,000,000. If they could all be reduced into 20 or 25 or 30 systems—I have no special number in mind—and if those systems were well balanced as between themselves, then on a basis of rates that would be established it might be expected that with equally efficient management they would all be able to operate and maintain their credit and serve the public. He thought from that point of view consolidation was very important, and I agree with him.

Senator SACKETT. Another point of view that he had I think was quite conclusive with him, and that was that there were a great many roads smaller in character that were not operating at a profit and could not be made to operate at a profit, and unless consolidation were brought about and they were required to be taken into consolidation, they were bound to go to the wall, break down, and lose eventually the service to the public. He felt—I heard him so state—that there was no other solution except for the Government to own those roads and operate them.

The CHAIRMAN. Of course, his great theory in the whole was a system of consolidation to take care of the weak lines. I have heard him say that he did not think great economies could be effected. I am very glad to have your opinion on that, Mr. Willard.

Senator SACKETT. Mr. Willard's opinion is quite different from what Senator Cummins gave us as his opinion.

The CHAIRMAN. Largely it was to save weak lines.

Mr. WILLARD. I think too much emphasis has been placed upon that, because I do not think the condition of the weak lines is quite as serious as that might imply, even under existing conditions. To-day the Interstate Commerce Commission has authority to fix division of rates between main lines and weaker lines and in a large measure can take care of them; but it is a fact that those smaller lines—and the C. I. & W. is an evidence of that kind of a line—put in with the stronger line like the Baltimore & Ohio can be better maintained and give better service to the public than it can all alone.

The CHAIRMAN. Of course, those weaker lines are not so weak as they were five or six years ago.

Mr. WILLARD. No. I would not like to have it thought—and if I gave that impression I would like to correct it—that there are no economies to be realized in an operating way from consolidation. I think there will be very considerable economies, but I think the amount has been greatly exaggerated in so far as I have seen from time to time.

Senator FESS. Senator Cummins very frankly stated, both orally and by written articles in magazines, that the public never would stand for the discontinuance of short lines that were serving sections, and yet, at the same time, were bankrupt; that the alternative would be Government ownership.

The CHAIRMAN. Yes.

Mr. WILLARD. I think that picture has changed somewhat since Senator Cummins's death, and that statement was, perhaps, too general to fully sustain. Now, there are short lines that I have known of that have been built into timber regions and the timber was cut off and moved and the country did not develop. Obviously, there is no need to maintain a line under such circumstances as I have stated. And I have no doubt that there are some short lines concerning which there is no difference of opinion with regard to the propriety of taking them out. There are lines in the State of Iowa that have been merged into the Burlington system. They are all giving better service to the public than they were when they were independent and separated and their tracks were poorly maintained. Those lines in Iowa in that agricultural country will probably get better as time goes on and may not pay themselves as independent lines, but as feeders of an important line might make a valuable contribution, and they could be kept and operated by such an arrangement, whereas, independently, they would not earn their keep.

Senator FESS. Senator Cummins had the idea also, which seems rational to me if it can be worked out, that while there is no hope of a general reduction of freight rates under the present cost of operation, if there could be a revision of the rate structure where an agricultural line might be attached to a line that is not agricultural but carries combined freight, there is the possibility of such revision lowering the rates on a road which is purely agricultural of itself. The Senator had an idea that that could be done.

Mr. WILLARD. Where there are such circumstances as you relate that could be done. Unfortunately, there are not so many of those. But the commission has a remedy for that that it does not hesitate to apply, and that is changing the divisions of the rates. Where two carriers participate in the haul the commission can adjust that so that the carrier that is earning much from the more profitable business can be required to carry at less rate and let the other road have the advantage. It is a mistake to think that there are no reductions in rates at the present time.

Perhaps you would be interested in knowing that if the Baltimore & Ohio last year, 1927, had received the same rate per ton-mile that it received the previous year, it would have earned over $4,000,000 more. We did not get the money and somebody else must have had it.

Senator FESS. That fact is not generally known to the public?

Mr. WILLARD. No; it is not. But the rates constantly are going down all the time imperceptibly. There is no combined effort, as a rule, to get the rates up. The railroads have not asked for much in this respect. I do not know that we have participated in any requests for several years, and there is a constant effort to get the rates down. Some shipper will find that on a comparative basis his rates are too high and they will be reduced, but the tendency is all to get rates down.

Senator SACKETT. Mr. Willard, do you know whether your experience in that regard in this past year is typical of the country?

Mr. WILLARD. I can not say but I fancy it is. As far back as 1912, when we were trying the Five Per cent Rate Case, we were trying to get our rates up at that time, and still on the Baltimore & Ohio the year when we were making our effort to put up our rates the reduction in ton-miles that came about that year through such influences as I have mentioned meant a loss to us of about $1,000,000. I think it would be a mistake for any one to think that the having of consolidation would mean a substantial reduction in railroad rates. Of course, that can not be considered without considering the other things. What prices will the railroads pay for what they buy and for their wages, etc.? It may well be that without consolidation rates would have to go up. I should hope not. I have no reason to think for the moment that they will, but it will depend on how all other prices are. There will be savings; how much I do not know.

Senator COUZENS. Mr. Willard, you were asked to come here primarily to point out any advantages that may accrue from the operating standpoint. As I understand it, your testimony to date is that there would not be great savings in operating. Just in that connection, I would like to know if your railroad executives have made any estimate at any time as to the probable saving in operating and management expenses if there should be a general consolidation?

Mr. WILLARD. They can not do that, Senator. I explained that, I think, before you came in; because, naturally, the executives of one road do not know what conditions are on another road.

Senator COUZENS. I understand that, but I know they do make a lot of estimates and statements of probabilities, and they must do it of necessity in arguing cases before the Interstate Commerce Commission.

Mr. WILLARD. Yes; but we do that generally by individual carriers. We make combinations that the individuals contribute to. I did cite one case, that of the Western Maryland. Were you here then, Senator?

Senator COUZENS. Yes; I heard that statement.

Mr. WILLARD. There was a saving of $150,000 a year.

Senator COUZENS. I was trying to get a picture of what it would mean in the whole United States if some general consolidation plan were carried out, such as has been generally discussed like the four great systems in the East, because there is an impression in the minds of some people that this whole consolidation problem or agitation is made from the financial and bankers' side rather than from the operators' standpoint. If that is not true, I would like to have some statement to that effect, because we are not so primarily interested in a consolidation bill for the benefit of the bankers as we are in a consolidation bill for the benefit of the possible increased efficiency of operation and decrease in cost of operation.

Mr. WILLARD. I think there will be substantial economies. As to how great or how little I can not tell. I think the public will be much better served. There will be more dependable service and a higher class service. They will get more for the same money, so that is certainly in the public interest. I think the processes of regulation will be very much simplified.

So far as the bankers are concerned, I do not know. We have never talked with our bankers at all about consolidation in the East; not once, except sometimes in a general way they would ask us what we were doing, but never in any sense have our bankers attempted or suggested that we do this, that, or the other thing. I think the influence of the bankers is very greatly overestimated to-day.

Senator COUZENS. You could hardly overestimate the influence of the bankers in the Chicago, Milwaukee & St. Paul receivership matter, could you?

Mr. WILLARD. I do not know.

Senator COUZENS. You have never familiarized yourself with the wrecking of that railroad?

Mr. WILLARD. No; I do not know anything about that, Senator.

Senator SACKETT. Of course, it must be recognized that any general consolidation would bring about necessarily new issues of securities.

Mr. WILLARD. It might.

Senator SACKETT. That would be an extremely profitable business.

Mr. WILLARD. It is presumed that it would be profitable, else the bankers would not stay in the business, but their profits are limited by the Interstate Commerce Commission even so. The railroads can no longer make arrangements with bankers that will stand the scrutiny of governmental authority.

Senator SACKETT. You do not feel that that would be a serious menace at all?

Mr. WILLARD. No; I do not. First of all, I want to say this for the banker; I think the banker performs a very important function for the railroads and I do not know who would perform it so well if the banker was not there. When we have had large financing to do we have been glad to have the advice of our bankers and to have their services, for which we pay. What we paid was always a matter of

discussion. Generally, we arrived at something that perhaps they thought was too low and we thought was too high. Anyway, we reached an agreement and they did the work. Our bankers have always done our work in good shape.

Senator COUZENS. That is Kuhn, Loeb & Co.?

Mr. WILLARD. Yes, sir. They have done the work in a way that has been very satisfactory to us, always. Now, of course, if we arrange to have work done by them as bankers, their commission has got be to approved by the Interstate Commerce Commission, so it can not be unreasonable, I assume.

Senator COUZENS. It is quite evident from the way the Chicago, Milwaukee & St. Paul situation developed that the Interstate Commerce Commission did not have much to say about that railroad.

Mr. WILLARD. Of course, that was all done before the passage of the present transportation act, I take it?

Senator COUZENS. Oh, no.

Mr. WILLARD. Was it not? I thought the extension was built.

Senator COUZENS. Yes; but I mean the way it was allowed to go into receivership, and what was done just prior to the receivership happened along after the transportation act of 1920.

Mr. WILLARD. It always seemed to me—and I speak without full knowledge—that what happened in the 8 or 10 years was simply the sequence of what must have preceded it and possibly could have been prevented. I do not know; I am really not acquainted with it.

Mr. THOM. In speaking of the economies, have you anything to say with respect to the economies to be derived through rearrangement of shops?

Mr. WILLARD. Yes; I think very considerable economies could be derived there in two ways. First of all, consolidations, such as we are discussing, would probably save the railroads, at least many of them, from the necessity of spending money for new shops that might be necessary if consolidation were not brought about. It might well be that one road had recently built a large shop looking to the future in excess of its immediate requirements. That might be put with a road that needed shops and the use of the two would prevent capital expenditures. That is a saving of capital. Then, presumably, if any company had the choice as to which one of the two shops it would close, it would close the less efficient one.

Senator SACKETT. The opposite might also be true?

Mr. WILLARD. Yes.

Senator SACKETT. There might be just as much loss the other way through the requirement to abandon shops because of roads being put together that had shops in the same town.

Mr. WILLARD. I can not imagine that a railway management having a real option in the matter would keep a real inefficient shop open and close the other one. But, in any event, there would be a saving in overhead.

Senator FESS. What is your practice with respect to the repair of cars? If you find a disabled car far distant from your shop do you get it back to your shop or do you take it to the shop of another road?

Mr. WILLARD. Customarily, if a Milwaukee car or a Burlington car was on our road and was injured, we would fix it good enough so it could safely go home and then let them make their repairs there.

Mr. THOM. Is there not a waste in that?

Mr. WILLARD. Some, perhaps; but I think that has been exaggerated.

Senator SACKETT. Is there a considerable advantage to the public in these consolidations in bringing together the ownership of freight cars into one system and the use of them on that line?

Mr. WILLARD. I think there is, yes, sir; but not as great as it would have been some years ago, because the railroads to-day themselves have their own agents here in Washington working with the Interstate Commerce Commission; but, at all event, have pooled all the cars of all roads in the United States under the transportation act. So they can not gain as much as they could before that act was passed. But it would be better, in my opinion, if there were 25 or 30 roads instead of 175 buying equipment and buying engines, and naturally they would work more in harmony with each other; their standardization would be promoted by such a plan; interchange would be more regular and dependable and less interfered with.

Mr. THOM. Would not the maintenance be better?

Mr. WILLARD. It might be expected to be better. I think maintenance is always subject to control. It would be better if they had the money with which to do it. When maintenance is not good it is usually because the earnings are disappointing and the managers are obliged to reduce expenses, just as an individual wears a suit of clothes two years instead of one. The managers are always subject to this fact, that they are held responsible for the safe performance of their roads, and naturally they do not knowingly permit their railroads to get into an unsafe condition. They may permit them to run much in need of paint. They may run rails 12 or 14 years, whereas they would ride more smoothly if they were run only 10 years. Perhaps they would not be smoother, but the public would have a smoother line.

Mr. THOM. If the roads were small in number would not the standard of maintenance be better than where there were 175, some of which had very limited means?

Mr. WILLARD. The standard of those particular lines might be better or the same as it is now, but the standard of all equipment under such conditions would be higher than the standard of equipment where much of it is owned by small companies and weak companies. Then, there would be saved the expense and delay incident to keeping the cars. When the cars go from railroad to another there has to be a record and men have to be there to make that record. Inspections have to be made. All that costs money and the more you can cut out those points the more you can eliminate expenses that do not do any good in themselves.

Senator SACKETT. There is another element that occurred to me. In freight solicitation where you are selling the same article, that is, transportation, at the same price through consolidation, you would be able to eliminate considerable personnel, would you not?

Mr. WILLARD. Undoubtedly.

Senator FESS. After all, the real test is whether the public is being better served?

Mr. WILLARD. Yes; and I think that is the greatest thing to be realized out of consolidation; the ability that the railroads will have to give better and more dependable service than they give with a lot of separate companies.

Senator COUZENS. Can you say what influence this consolidation would have on the matter of employees? For example, we remember the shop strike of 1922 where some roads settled with the shop men and put them on a decent living basis and others refused to do so. Do you consider a large number of consolidations, making fewer managements to deal with, would improve or depreciate the condition of the employees?

Mr. WILLARD. I do not think they need necessarily to change it at all, Senator.

Senator FESS. Mr. Willard, that opens a very interesting inquiry. Under the adjustment law of last year there have been a great many disputes settled, have there not?

Mr. WILLARD. Yes.

Senator FESS. And there have been no strikes?

Mr. WILLARD. That is true.

Senator FESS. Can we attribute that situation in part to the legislation?

Mr. WILLARD. Well, all the legislation did was to provide an agency and outline a procedure that might be accepted by the men if they wanted to do it, and equally so by the companies. Of course, it was not compulsory. I assume we will not have compulsory labor legislation in the immediate future, and the legislation, of course, went as far as it could, I think. We have had the experience of 25 or 30 years under the Erdman Act and the Newman Act. We have learned a little. Something new was put in. Upon the whole, I think the present law providing for settlement of railway disputes is, perhaps, as good as anything we could get at this time.

Personally, I was sorry to see the labor board abolished. I felt that that might have succeeded, and if it did succeed I thought it would be a good thing, but, unfortunately, it got off wrong and did not succeed, and I think Congress did right in doing away with it and trying something else. I do not think this is any permanent settlement of the labor problem.

The CHAIRMAN. Up to the present time it has succeeded admirably?

Mr. WILLARD. It has succeeded very well.

Senator COUZENS. Are there not a number of roads that have not come under the law or worked in harmony with the law?

Mr. WILLARD. I do not think so to-day, Senator, personally. All of them are paying wages fixed by arbitration. Of course, you can always avoid a strike if you give the wages. Sometimes the management thinks it is not wise to give the wages, and then the board of arbitration, as provided by law, comes in and they give increases. The increases that the Baltimore & Ohio has made in the last year amount to six and a half million dollars, but they have all been made in accordance with procedures approved and laid out by Congress and so we accept them as being right. Of course, it has come out of rates.

The CHAIRMAN. In the eastern section the labor people asked for arbitration. In the Southeast there was a partial settlement that seemed to be satisfactory all around, and in the western section of the 57 western railroads up to one time the labor people lost their contention, and it seemed to be, on the whole, a very satisfactory adjustment; that is, under the conditions.

Mr. WILLARD. Yes. If you wish my opinion as to whether the labor legislation in the act has worked well or not, I think on the whole it has worked very well and justified itself.

Mr. THOM. Mr. Willard, you referred to some of the savings from an operating standpoint. Would you be willing to elaborate a little more on the question of the advantages in respect to terminals, including in that not only the big port terminals, but what are known as terminals of the railroads, division points and junction points?

Mr. WILLARD. I think intermediate points will be eliminated and delays cut down and the movement will be expedited as a result of more consolidation. I have never been able to see how there could be so very much economy in the terminal situation in large centers because the cars all get there. It does not make any difference how many different roads they go over, they all get to the same place and have to be handled in the same yard. It may be that instead of six or eight roads handling terminal matters in some large place, there might be four. Then there might be a combination of those terminals and mor efficient use might be made of the facilities. It is conceivable that the public might be a little better served, and there might be some saving.

Senator COUZENS. Would there not be a good deal of economy if these consolidatinons would arrange to route their cars not to go through these terminals for through business? Take, for example, Cleveland, which is not a terminal but a big shipping center, and yet every shipper wants to get away from the congestion there. Would there not be some advantage in consolidation to avoid going through that terminal?

Mr. WILLARD. I should think there would be in such a case as that.

Mr. THOM. Is it not also true that to handle traffic through a congested center, or over a congested line, is more costly than handling it over a line that is not congested?

Mr. WILLARD. Certainly.

Mr. THOM. And if you have your choice of avoiding congestion and handling it over uncongested lines, you would be able to handle it at a lower cost?

Mr. WILLARD. Yes. I referred to that a short time ago when I spoke of desiring to get a line around Pittsburgh.

Senator COUZENS. There is another feature I would like to have you touch on, and that is that at quite a few places centers have grown up around railroad shops and many homes have heen purchased and people have settled there because of the workmen working in the shops. If a consolidation were arranged and some of these roads were abandoned in the interest of an at least alleged economy, would not great protest and perhaps damage be done to those communities?

Mr. WILLARD. That might be true, but that situation is no different from what it is to-day, Senator. We have a very concrete case in point at Garrett, Ind. That is a division point. Years ago engines had to be changed when they ran that far. They do not need to be changed now. The engine men and conductors still live there and they probably would because they can get off the engine and another crew get on the engine and go along. It does not affect the train engine men so much. It does affect the men required to work in the shops. Where this has happened we have used such influence as we have been able to exert to get industries to come there

and furnish employment to the men that might be displaced by changed conditions; or we would move the men displaced there to other shops of the railroad because the work will be increased somewhat at other shops. We moved some 40 or 50 men from Garrett to Willard where there would be more work for them. Then when we found that we could not get the industries to come there we rearranged to put 50 or 60 men to work on the kind of work that would be economic for them to perform there. The point I wish to make is that it is quite right. There is that human problem and we try to perform it in a human way.

Senator COUZENS. That is the point; they are not all so humanitarian as the Baltimore & Ohio.

Mr. WILLARD. It might be emphasized a little. But the problem is there to-day.

Senator FESS. But that situation is inevitable in the growth of the country?

Mr. WILLARD. Yes.

Senator COUZENS. But it would be accentuated somewhat by consolidation?

Mr. WILLARD. It might be.

Mr. THOM. Mr. Willard, the present law provides on its face that rates must be made higher than they otherwise would be if the prosperous lines only were considered in order to take care of less prosperous lines. If the process of consolidation were wisely carried out, how would that affect that problem of rate making?

Mr. WILLARD. Well, I think it would simplify it very much. I know that Senator Cummins thought, when I talked with him about the division of excess earnings which Congress thought was wise in this law—and I thought so too—would not be necessary if we did not have so many roads of varying degrees of financial strength and if we get a relatively small number, 18 or 20 or 30 well balanced between themselves so they get into the same markets, then that division of excess earnings would not be necessary, because they would all be able to live on the same basis of rates, and if the rates were too high, they would be reduced and if they were too low they would be raised. It would simplify that.

The CHAIRMAN. Have you ever studied the whole situation of the country in order to know whether or not such a condition as that is possible, to bring about the 18 or 20 systems?

Mr. WILLARD. I think it is, Senator. I want to say something about one suggestion as to this law. I have discussed it some with my friend Colonel Thom, and my views did not seem so thoroughly accepted as I should hope that this committee might do. I will say, however, that my associates, we thought, wanted something that was not necessary.

Now I have felt, and I still feel, that the law itself in the declaration of policy ought to be just a little more specific than it is. I have thought that the purpose of consolidation which Congress had in mind was to build up a group of railroads relatively of the same financial strength, and not to make some stronger that were already strong. That would seem to be true.

Now, to-day that is a difficult matter, and in our discussions during the last two or three years we have found that that naturally was one of the most difficult phases in bringing about consolidations. It

is perfectly human that the railroad company which may be in a strong position in its group previous to consolidation would desire to maintain that strong position in the group, while the purpose of the law would be relatively to weaken its position. Not really weaken it, but by making others stronger relatively it would be weakened. And that has been the basis of most of the discussions; that has been the most difficult thing to surmount in trying to get voluntary consolidation.

Senator SACKETT. Is that a thing that is between the railroads or in the interest of the public?

Mr. WILLARD. That is a thing that is between the railroads in the immediate instance, and in my opinion, unless Congress was all wrong, it is in the public interest in the last analysis.

Professor Ripley, who in my opinion was a very able economist—I do not think the commission could have employed a more able man than he is to report on this matter—in his report used some language as to his understanding of what the act was intended to accomplish which seemed to me was an arrangement of language that was very happily chosen. He said:

> The purpose—

referring to the consolidation—

> The purpose being to promote a more evenly balanced competition, especially by means of equalization of opportunity in originating traffic and getting to exchange points and places where traffic will be used.

That is not all his language. I am quoting it liberally.

Now what I mean when I speak of it is this. If the Baltimore & Ohio, for instance, is to be on a basis of general equality with the other groups in the eastern region we must be able to get into the fields where traffic originates generally, and to the markets where traffic is consumed. We must obviously be in Chicago. We must be in Chicago. We must be in Toledo. We think we must be in Detroit. And we must be in Cincinnati and Pittsburgh and all those places. We think we should be in New York. We are not there now, but we think we should be there if we are to compete on terms of equality with the other groups.

Now I think the law and both of the bills—this bill and the bill in the House—lack just a little of definiteness concerning that particular phase, and I think that in the declaration of policy it should be made more definite than it now is: That it is the purpose of this act to build up roads of equal strength, not guaranteeing anybody anything, but giving so far as possible equal opportunity to all the groups so constructed so that on the same basis of rates with equal management they can be successful and do what the law contemplates. Now there I should hope, if such legislation as proposed in the Fess bill is approved, that consideration would be given to the thought I have in mind, a little more consideration than has been given.

The CHAIRMAN. What sort of consolidation have you in mind that would enable you to get into New York?

Mr. WILLARD. Why, the Reading, Central Railroad of New Jersey. We do not go into New York, but we go to the west side of the Hudson, which is as far as we could expect to go by rail.

The CHAIRMAN. You go there now, do you not?

Mr. WILLARD. Well, we go there by arrangements and division of the rates. Except our passenger trains and some of our freights.

We run our engines there, but we do not operate the road. We are there simply as a tenant.

The CHAIRMAN. Yes.

Senator FESS. There has developed some opposition in the House and over here also in making a declaration of policy in the law.

Mr. WILLARD. I can not conceive why it is, Senator, unless those who have an advantage want to retain it, but I did not understand that that is what Congress had in mind.

Senator COUZENS. Well, in that connection, I do not have any objection to making a declaration of the intent of the law with respect to the feature which is developed by Mr. Willard, but I have a very violent objection to the declaration of Congress that this consolidation is to be the policy in practical perpetuity.

Mr. WILLARD. Well, I do not care what you say about that.

Senator COUZENS. No. But I think that the point that Senator Fess has in mind is the objection to declaring the wisdom of these consolidations. I think Congress goes far enough if it provides the means, and let the railroads develop their own consolidation, and let us see how it works out, without having gone on record that we approve of consolidations. We just give them permission to do it, and let them work it out. But, when it comes to developing the point that Mr. Willard makes, I think that might properly be put in the law without declaring a policy as to consolidations generally speaking.

Mr. WILLARD. If I may be permitted to say so, Senator, I must say I do not quite put the same importance on that that you do, because it seems to me the very fact that Congress permits a thing to be done must imply that Congress approves of it or it would not permit it. So it does not impress me as strongly as you.

The CHAIRMAN. The act itself is more or less a declaration of policy.

Mr. WILLARD. It would seem so.

The CHAIRMAN. Because the fact that we pass a law enabling the railroads to do it means that we give approval to the scheme. You might not say in perpetuity; I agree with that.

Senator COUZENS. Did you have anything more you wished to say, Mr. Willard?

Mr. WILLARD. I think I had made all the direct statement I cared to make, unless there are some further questions.

Senator SACKETT. I wanted to ask you this: Senator Cummins in all his arguments in favor of the consolidation of railroads always felt it necessary to put some element of coercion into the thing in order to bring about this consolidation. What is your thought on that? He delayed it until after a voluntary period.

Mr. WILLARD. Yes. Well, I was led to about the same conclusion that Senator Cummins was, that starting from this point consolidation is either a good thing or it is not in the interests of all the people, including the railroads, of course. Now, if it is a good thing, we ought to have it. But it is a very complicated and complex thing, and it would be better, perhaps, for a while to let it be voluntary and let people who are most directly concerned with it work it out without pressure. But if it should develop that after a sufficient time they are not able to complete it, and if we still think then it is still a good thing, then I think there should be some way to make it effective in the interests of the public.

Of course that was the way it was handled in England. They started after we did and they got through very much quicker. I am not so sure that doing it as quickly as they did was perhaps the best thing, because the results in some respects have been rather distressing. They hurriedly put things together that, if they were doing it again, they would combine in another way, probably.

In such a big matter as this I do not think time is of the essence. It is more important that what we do should be right. But if it really is a good thing then it ought to be accomplished, and there should be sufficient time for voluntary consolidation, and if they do not get done in that time why then I think Congress very well might say, "Well, we will look into it and see what to do next."

The CHAIRMAN. Well, it is a general opinion, is it not, among all railroad managements that consolidations must come, and are they not working to that end now?

Mr. WILLARD. Well, I think there is a general desire to bring it about.

The CHAIRMAN. Yes.

Mr. WILLARD. But, of course, you must bear this in mind, Senator. There are 175 class 1 railroads in the United States, and some five or six hundred of less important roads. They have their separate groups of officers, and they are all human, just as we are, and they may not be so impressed with the importance of consolidation weighed against the effect it may have upon them personally.

The CHAIRMAN. Certainly, that human element is present.

Mr. WILLARD. Now you would not expect them to be actively promoting consolidation. And that is one phase of this picture that I think Congress should properly have in mind, because they did that in England. They knew in doing this thing they were breaking up relationships that men had established during their lifetime. They were displacing railway officers of considerable importance, with nothing else for them to do. And they did not just merely throw them out ruthlessly, and I do not think we should here. I think we should deal with the railroad officers just as generously as I am in favor of dealing with the machinists or engineers, or the citizens in Garrett or anywhere else. They are all entitled to the same treatment. And that is one reason why you can not expect to realize all at once the ultimate economies that would come from that.

The CHAIRMAN. If this law be passed is it not your opinion that consolidations will go forward apace with becoming rapidity?

Mr. WILLARD. I think consolidation would be stimulated under this law.

The CHAIRMAN. Yes.

Mr. WILLARD. It seems to be the thought of those who have studied it more than I have that there are now obstacles that would be removed by this, and I think there is this general appreciation. Congress has certainly indicated its approval of consolidation. Congress would not have said anything about it at all if they did not want to see it realized. I think we have a right to conclude that. Now, if that is to come about, then the quicker it comes the better. This period of uncertainty is anything but good at the present time.

Senator FESS. Mr. Willard, there are two theories here before us. One is to give the commission authority to do within a certain time,

and if it is not completed by that time, why, then, the Government proceed.

Mr. WILLARD. Yes.

Senator FESS. That is one theory. The other is to give them permission to go ahead, and if at a certain time it is not completed, the commission to make a report to us.

Mr. WILLARD. I am inclined to favor the latter rule for this reason: Suppose you give them five years, or whatever the limit is.

Senator FESS. Seven years.

Mr. WILLARD. Well, whatever it is. Presumably the picture will be a little clearer then than it is now. Maybe you will not want consolidation then. Maybe you would not want to go ahead. Maybe the legislation that you need would be of a different character than you wish now. In any event, you will have learned a lot in that seven years, and you could decide then to make it compulsory if you want to. I see nothing to be lost by such an arrangement.

Senator FESS. I would like to have your opinion upon a mooted question. There is a conviction among certain people that we could have consolidation under the present law.

Mr. WILLARD. Yes.

Senator FESS. The commission seems to indicate that they are incapable of carrying out such a law.

Mr. WILLARD. Yes.

Senator FESS. I should like to have your opinion as an expert operator whether the consolidation is likely to go on without any change of the law?

Mr. WILLARD. Oh, I suppose it will go on. It may not go as rapidly and as satisfactorily as it would if the law were passed. Now I know my views are not in accord with those that are held by Colonel Thom and many other men in the railroad service. I have felt that so far as the Baltimore & Ohio was concerned we could bring about unification of properties just as we did in the C., I. & W. under the present law, because we did it to that extent, and I thought we could do it to a greater extent. But I am told that because of the difference of laws in some of the States that could not be done. And men who have studied it much more than I have seem to feel and do feel that the law ought to be changed.

The CHAIRMAN. Well, the commission does too.

Mr. WILLARD. The commission feels that way, and I accept their views that it is necessary.

Mr. THOM. Mr. Chairman, I wanted to ask the witness whether he would object to my asking him to put in the record a statement which has been signed by him and by Mr. Crowley, of the New York Central, and by Mr. Bernet, who then was the president of the Nickel Plate System, stating in brief form the advantages to be derived from a consolidation into a four-system plan of the railroads in the East, and I wanted to ask him that because I think that statement is succinct and is typical of what would be done everywhere.

Senator COUZENS. When was that statement made?

Mr. WILLARD. I think it was made in 1924. It is just as true now as it was then.

Mr. THOM. January 26, 1925. It is in print before me, and if there is no objection I would like for him to read a page from that showing the general conclusions.

The CHAIRMAN. Yes; certainly.

Mr. WILLARD. I would like to explain why I did not want to do it without being requested. I did not know Colonel Thom was going to request me. My friend, Mr. Loree, has got another plan, and I do not like his plan at all, and I am not at all in sympathy with it. At the same time I did not want to appear to be taking advantage of him and reading before this committee the plan that I had approved of because I had approved of what is set forth here. But it does apply generally, I think, to the general situation, and I will only read that much of it which specifically refers to the general advantages which may be secured by an appropriate four-system plan, and the same thing would be true of any other plan that was an appropriate plan. [Reading:]

Some of the general advantages which may be secured by an appropriate four-system plan appear to be as follows:

First. Nearly all of the principal producing and consuming centers of the territory may be served by two or more and in many instances by all of the systems.

I have already pointed out that we arranged to have not less than two anywhere so as to keep up good competition.

Second. Each of the systems may be ramified throughout the territory and may be in a position to contribute to the widespread distribution of the traffic of the territory.

The importance of that is this: That the Baltimore & Ohio, serving Baltimore, should be able not only to take Baltimore's business along in a straight line to Chicago, but should be able to branch off at places and take it to cities like Toledo, Cincinnati, Columbus, Indianapolis, and all those places, and if Baltimore is to be as well served as other cities it ought to have a line where there would be just a one-line movement and would not have to go over two lines if it was to be served equally well. That is what we mean by the ramifications.

Third. Each of the systems may have adequate access to the sources of fuel supply and each may participate to a large extent in the commercial distribution of coal.

That was a point in trying to get voluntary consolidation. We felt that was something we must do. Each of the four systems should get into the fields where coal is made and they should reach the places where coal is used, so that on a one line movement each system could handle coal as expeditiously and conveniently as the others could so its shippers would be just as well served.

Fourth. Each of the systems may have access to at least two of the five principal north Atlantic ports, though no one of them may have access to all of said ports, and thus both the service to and competitive relationship of the ports may be maintained and safeguarded.

Fifth. Each of the systems may have substantial access to the lower lake ports and thus participate in the transportation of the large volume of coal and ore traffic passing through these ports.

All four of our proposed groups went to the Lake Erie ports, so that they could all participate in that.

Sixth. Mileage, property investment, gross earnings, and resulting net railway operating income may be more nearly equalized—

With the four-system plan—

than would be possible in the case of the larger number of systems.

That all applies to this eastern circumscribed region.

Seventh. The systems may, generally speaking, have equality of opportunity to serve the public throughout the territory, to provide adequate facilities, and make necessary extensions from time to time with reasonable expectation of securing additional traffic.

Eighth. A greater amount of actual and effective competition in service may be assured by four systems well articulated—

Reaching all these various points—

than by seven or eight systems, more or less incomplete.

That statement would apply to any well-worked-out system of consolidation, and it indicates the advantages that may be expected to accrue to the public as well as to the railroads.

Once again, Mr. Chairman, I fear I may have created the impression that the economies to be had by consolidation are rather inconsequential. I would not want to be thought that way at all, because I think they are substantial. I have said so. But I do not think under full consolidation that there would be immediately realized such large savings as to encourage the hope of an immediate reduction in rates. That is the only thing. I do not want to encourage that thought and then have it develop later on that the people had been misled. There will be undoubtedly substantial savings. But the thing that Senator Couzens has mentioned, and properly so, is going to retard savings.

Now take Chillicothe, Ohio. There is a city where we could discontinue much more than we have the employment of shopmen and run our trains through there, because modern engines are capable of doing it. We have done something. We have hesitated. We want to give the people the time to readjust themselves. We want to take the employees elsewhere. We can not go around and upset long-established conditions.

Flora, Ind., in your State, Mr. Chairman, is another place where there could be a reduction. But it takes time to do this. It may take several years. We hope eventually to bring in industries and make such adjustments that no one will be seriously injured. But if we are to go ahead and take the full advantage of all these modern improvements, if we are to operate the railroads efficiently and with economy, as the law states, why then somebody is going to get pinched at times in the doing of that thing. But that is because Congress has set that standard it is for us to follow.

Senator COUZENS. There is one other thing I would like to ask, and that is, I understand that some of the railroads are very arbitrary in the purchase of their bituminous coal and they insist upon such a low rate that the operators can not make a living, and I wondered if the consolidations would not bring about greater power and greater strength among the railroads so they could almost annihilate the coal operators by insisting upon such a price for coal, and, because of the volume, get it, and thereby do great injury to the bituminous coal mining industry?

Mr. WILLARD. Oh, I don't know. That might be possible, Senator. We have been accused of that same thing without consolidation. Maybe I am one of those—the Baltimore & Ohio—that has been brought to your attention. But here is the problem. Take it in a large region like West Virginia. Our contracts expire in April. Large, reputable concerns come to us and say, for example, they will

furnish coal this next year at $1.50 or $1.60 a ton. They have been furnishing it at $1.80 or $1.90. They offer to do it. What are we to do? Are we to say, "No; we think you ought to have more"? You have told us we have to buy economically. Now we have tried to be liberal in the matter. I am sure I can say, because this matter was under discussion not long ago, that in this present year we have not asked a single man to reduce his bid on coal. The bids have come to us voluntarily, and in some places we have not availed ourselves of the lowest offer.

The CHAIRMAN. You have not used one against the other?

Mr. WILLARD. We have not; no, sir. Now still it is possible, as the Senator says, that with that combination something of that kind might happen, I suppose. It is because we are human. The other side happens when the coal man has the say in the matter. We get both ends of it.

Senator COUZENS. Well, a very able Senator said to me that the New York Central in buying coal from the Pennsylvania coal fields was very liberal and generous in the treatment of the coal operators.

Mr. WILLARD. Yes.

Senator COUZENS, Which was in turn reflected upon the wages of the employees.

Mr. WILLARD. On their employees; yes.

Senator COUZENS. Yes; on the coal operators' employees. But the Pennsylvania was very grinding and grasping and insisting upon getting the coal at a ruinous price, which in turn was, of course, reflected upon the coal operators and the workers.

Mr. WILLARD. Yes. I am inclined not to take that so very seriously, Senator, because there is the other side to that that may not have occurred to you. Suppose a shipper were to come to us and say, "We can ship over your road or some other road, but if you will pay us 10 cents more than we get with the other road we will give you all our business?" That is buying business and we would be accused of doing it. And one has to be rather careful not to be too liberal because you lay yourself open to the charge that you are doing it to influence the movement of business. That is, in short, granting a rebate, which is prohibited by law. You have got to work within pretty definite limits there.

Senator FESS. A brief came to my desk yesterday charging the B. & O. and the Pennsylvania and the New York Central, all three, in specific items with reference to the buying of coal. I have not been able to examine it.

Mr. WILLARD. I am familiar with that, Senator.

The CHAIRMAN. Well, there is a resolution for an investigation of that very question pending before this committee now.

Mr. WILLARD. If I may say a word in that connection. It gets to this: I looked that up some time ago when it was brought to my attention. It was said that we were buying coal produced in a nonunion region and shipping it West into a field that might be served by a union region; that is, southern Illinois. I looked into it to see why it was, and the reason was just as I have already stated. It is customary to make our contracts for a year, and when our contracts were made last April the mines in Illinois and Indiana and out there were all shut down, they could not take any contracts, they could not furnish any coal, they could not agree to furnish any coal, and we

had to arrange to buy our coal somewhere else for a year's period. And that is why we were doing that. Not because we were taking part in a labor contest at all.

Senator COUZENS. Are you through, Mr. Willard?

Mr. WILLARD. Yes. I would like to say this, if I have not made it clear, that for three years, to be specific, the Baltimore & Ohio has not fixed the price which we would pay at all, but it has been fixed by the operators themselves, and they have come to us and named it.

That is all I care to say.

The CHAIRMAN. We are very much obliged to you, Mr. Willard.

STATEMENT OF R. C. FULBRIGHT, CHAIRMAN OF THE LEGISLATIVE COMMITTEE OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, HOUSTON, TEX.—Resumed.

Mr. FULBRIGHT. Mr. Chairman, I had just one little statement that might be in the nature of correction of testimony that I gave the other day. It would only take me about three or four minutes.

On last Saturday, the 14th instant, I appeared before this committee, and there are two statements that have been called to my attention that possibly should be elaborated upon just very briefly.

The first statement was to the effect that I did not consider the matter of railroad consolidation legislation as a major or important undertaking. Several times in the course of my remarks I did state that I thought that it was of very especial importance that Congress undertake as soon as possible to pass legislation containing adequate machinery to carry out such consolidations as the commission should find to be in the public interest, and, as we always put it, the shippers—not to substantially lessen competition. Now, the machinery in the bill as a whole is a splendid piece of work designed to that end. There are a few minor corrections—I think that most of them have been agreed to. I wanted that clear, that the shippers wanted to see the legislation put through, because we are dissatisfied with the existing law.

On the other point that I had in mind, we of course, are insistent upon leaving out of the law anything that in itself would be a general declaration of policy with all of these standards that we argued about pro and con. We believe that the Interstate Commerce Commission will hear all of those arguments as they apply to the particular case and will judge of the public interest with those things in view.

Reference was made too to the weak-line problem, and also in response to a question from the Senator from Michigan, I stated that the most important feature of this was that it was of interest to the bankers or the investors.

I want to elaborate on that just a moment. I do believe that the greatest benefit to be derived from proper consolidations will be of primary interest to the investors, the people who have to furnish money for railroad improvements or have to raise money for it. That is usually done through banking channels. Now that is of interest to the public because if a railroad will have its financial structure strengthened by combining its financial possibilities with those of some other line that has a better program and is more able to carry out that program, then that railroad will be better able to tide over the stress of hard times and avoid possible receiverships or the impairment of its service.

I will illustrate that by taking the Baltimore & Ohio. I want Mr. Willard to hear this. The Baltimore & Ohio has a financial structure and a financial policy that it has worked out to suit its needs. The Central of New Jersey has a financial policy. Some of the other lines that may be contemplated to go into a consolidation that they may have in view will have a certain financial policy. Now each of those has been developed in accordance with what that railroad is able to do. Now if one of those railroads is a weak line, manifestly its financial ability, its ability to finance needed improvements, its ability to render the best service at all times, even when business is dull, will by improved by combining it with the Baltimore & Ohio, a stronger line.

Now the public is interested in that. And therefore when I stated that I thought the biggest interest was that of the bankers and investors I did not mean to state that that was not of interest to the public, because it is of interest to the public. I stated that I thought the problem of the weak lines was exaggerated, that it was not as great. But I do not mean by that to state that there are not many instances where consolidations can still be carried on that will be in the interest of the shippers, and that is the interest that I represent in speaking before this committee.

I just want to make that brief statement.

The CHAIRMAN. Very well, thank you, Mr. Fulbright.

The committee will now adjourn.

(Whereupon, at 12.05 p. m. Saturday, January 21, 1928, the committee adjourned to meet at the call of the chair.)

×

NEH MSH 01373

APR 15 1994

COLUMBIA UNIVERSITY LIBRARIES
0041406583

COLUMBIA UNIVERSITY LIBRARIES

This book is due on the date indicated below, or at the expiration of a definite period after the date of borrowing, as provided by the library rules or by special arrangement with the Librarian in charge.

DATE BORROWED	DATE DUE	DATE BORROWED	DATE DUE
DEC 16 1949	1/4		

C28 (747) M100

D530.2 Un33 pt. 1

D530.2 Un33 Pt.1
U.S. Congress Sen.
Consolidation of Railway Properties
DEC 16 1949 R Berger 50-50, 48 St
1/4

APR 5 1949

385
Un311
c
Pt. 2

CONSOLIDATION OF RAILWAY PROPERTIES

HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE COMMERCE
UNITED STATES SENATE

SEVENTIETH CONGRESS

FIRST SESSION

ON

S. 1175

A BILL TO PROMOTE THE UNIFICATION OF CARRIERS ENGAGED IN INTERSTATE COMMERCE, AND FOR OTHER PURPOSES

PART 2

MARCH 3, 1928

Printed for the use of the Committee on Interstate Commerce

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON
1928

81538

COMMITTEE ON INTERSTATE COMMERCE

JAMES E. WATSON, Indiana, *Chairman*

FRANK R. GOODING, Idaho.	ELLISON D. SMITH, South Carolina.
JAMES COUZENS, Michigan.	KEY PITTMAN, Nevada.
SIMEON D. FESS, Ohio.	WILLIAM CABELL BRUCE, Maryland.
ROBERT B. HOWELL, Nebraska.	C. C. DILL, Washington.
GUY D. GOFF, West Virginia.	BURTON K. WHEELER, Montana.
W. B. PINE, Oklahoma.	EARLE B. MAYFIELD, Texas.
FREDERIC M. SACKETT, Kentucky.	HARRY B. HAWES, Missouri.
JESSE H. METCALF, Rhode Island.	HUGO L. BLACK, Alabama.
COLEMAN DU PONT, Delaware.	ROBERT F. WAGNER, New York.

JOHN F. HAYES, *Clerk*

CONTENTS

Statement of—	Page
Cain, Ben B., 1319 F Street NW., Washington, D. C.	195
Cass, L. S., Vice President American Short Line Railroad Association	224

385
U.S.H.
C.
P.O.

CONSOLIDATION OF RAILWAY PROPERTIES

SATURDAY, MARCH 3, 1928

UNITED STATES SENATE,
Committee on Interstate Commerce,
Washington, D. C.

The committee met, pursuant to adjournment, at 10.15 o'clock a. m. in room 212, Senate Office Building, Senator James E. Watson presiding.

Present: Senators Watson (chairman), Couzens, Fess, Pine, Sackett, Smith, Dill, and Mayfield.

The CHAIRMAN. Who is the first witness?

Mr. CAIN. I would like to be heard briefly, Mr. Chairman.

STATEMENT OF BEN B. CAIN, WASHINGTON, D. C.

Mr. CAIN. My name is Ben B. Cain. My office address is 1319 F Street, Washington, D. C.

Mr. Chairman and gentlemen of the committee, I appear for the purpose of presenting as well as I can the situation of the short and weak line railroads.

Permit me to say in the beginning that when I use the words "short line" or "weak line," I use them interchangeably, because there is no difference in the situation of those two classes of roads that are commonly called weak lines or short lines.

My thought is that on account of the lack of time of the committee, with your approval I can certainly finish what I have to say within the morning session, unless the members of the committee see fit to ask questions, to which I do not object.

I wish to present to you, first, the importance of the short lines or weak lines; second, the perilous situation of those railroads at the present time; and, third, the remedy that is proposed through consolidation and the effect of this bill upon that class of carriers.

So far as the trunk lines and the short lines are concerned, there are no substantial differences between us, but there are some matters of minor importance as to which we are not in entire agreement. I will address myself to those when I come to the bill.

It has been asserted by at least one witness who has appeared in these hearings that the weak line problem is not a major problem.

I take issue with that statement. It was the weak line problem that confronted Congress when you wrote the Federal control act, it was the weak line problem that confronted you when you wrote the transportation act of 1920, and it is that problem that confronts you to-day if you are to deal with the railroad problem in an effective and helpful way.

There are in the United States 22,000 miles of short line railroads; that is, roads classed as II and III. There are something over 30,000 miles of railroad that are within the classification of Class I railroads that are weak roads.

Those 50,000 miles of railroad are not, as has been suggested, all the roads that Senator Cummins included in his list of 80,000 miles of weak railroads. Hence I have undertaken to eliminate from the classification of these roads those that are within the class of weak roads to-day. It has been suggested that Senator Cummins should not have included some of the railroads that he did include as weak railroads in his list.

The CHAIRMAN. Is that classification matter of importance to us?

Mr. CAIN. It matters only to this extent, Mr. Chairman, that I do not know how much the committee may be influenced or how much members of the committee who are not familiar with all of the facts might be influenced by the fact that a road that was weak yesterday is strong to-day, and the fact that some roads that were included by Senator Cummins as weak roads, such as the Panhandle & Santa Fe, which was then a part of the Santa Fe System, an operating unit, is now a strong road.

That has been pointed out, and it has been followed by the suggestion that the weak road problem is no longer a major problem.

If you will permit me to do so, I want to say that Senator Cummins did not insert in the list of roads that you will find in the previous bill any provision regarding the Panhandle & Santa Fe and carriers of that character for any other purpose than to show the Congress that but for the fact that such a road as the Panhandle & Santa Fe, which is an operating unit of the Santa Fe, had a parent company and thus the benefit of consolidation or unification, that such would be a road that would be in the weak class and was in the weak class, taken independently of its parent system.

Senator FESS. There is no doubt that there are cases where the short line or weak line, at one time very weak, has become stronger and self-supporting, and, on the other hand, there is no doubt that there are some short lines that have become weaker.

What the committee would like to know upon the general proposition is whether the short-line situation, aside from a few cases going into extremes, is such that some relief must be had.

Mr. CAIN. Answering that question, Senator, I go back to the statement that there are 50,000 miles of weak railroads to-day; and unless they have relief of some character they will of course grow weaker. For this reason, that you can not conceive of any sort of railroad that is engaged in interstate commerce, whether it is what we call a branch line or whether it is a competitive line, that is a line in connection with more than one railroad, that is not in competition, directly or indirectly, with the strong carriers.

A small railroad that connects with more than one major carrier is what we call a competitive line; and that line, of course, is in competition with one or the other of the strong carriers with which it connects. It is directly in competition.

To illustrate what I mean, I will mention one or two concrete cases.

Very recently it has come under my observation that a short-line railroad that connected with two major carriers and could thereby

be used as an intermediate carrier for a through shipment of freight, procured a routing order upon a shipment of mining machinery that moved into the State of Texas; the purpose being to establish a very large mine there to handle lignite coal which is now being used in that State for the purpose of creating electric power and for other purposes.

That shipment moved after the routing order had been procured, but the routing order was canceled and disregarded and when the small railroad that had procured that routing order protested, the shippers informed the road that they were compelled to do it because the trunk line with which they connected in Oklahoma or with which their mines connected in Oklahoma, were patrons of the company, and because of the influence of that road they were compelled to regard its demand for a change in the routing order, and this little road lost the shipment.

That is a mere instance of the influence and power of a large corporation in the matter of getting business.

The same thing obtains in regard to the location of industries. If I have a little railroad that is in competition with a larger railroad, and you are going to locate an industry in the town or in the city where my road is and other roads are, you are not going to locate your industry on the little railroad, but you will locate it inevitably upon the strong railroad for many reasons.

If the committee will allow me, rather than to go further into illustrations of this character I have before me the sworn statement of a witness who appeared in the Loree cases in the State of Texas; and that witness, who is Mr. Wortham, the receiver of the Paris & Mount Pleasant Railroad, a man known all over the State of Texas, gave instance after instance where that road, which is about 60 miles long and connects with certain roads at Paris, Tex., and with the St. Louis Southwestern at Mount Pleasant, Tex., failed to get location of industries, failed to get shipments, and where various things happened which added to the poverty of that road occasioned by its inability to compete with stronger railroads.

Senator SMITH. You keep using the word "compete." Do you use it in the common acceptance of the word, under the conditions that you are now describing?

Mr. CAIN. I mean it both ways, Senator.

Senator MAYFIELD. Competition for business and service?

Mr. CAIN. I mean that, and I mean more than that, Senator Mayfield. I mean a small railroad that is merely a branch line. It does not compete itself, but every industry on that line and every business on that line is competitive with the business on another line that is in that immediate territory; and the result is inevitably that if the business or the industry on that little branch road or stub can not get as good service, can not move its traffic on as good a rate—and you must bear in mind that a two-line rate makes a difference in the cost—then the industry on that road will ultimately leave it and go to the road where the service is better and where the rate is lower. If it does not, another industry will not go on that road, for the very reason that it can not compete with the industries surrounding it. That is what I mean by competition.

Senator SMITH. So the point that you are making—I want to get this clear in my mind—is that where freight is transferred from

one road to another there is a change in the tariff making the rate higher when it goes over this independent short or weak line than if it went continuously over the main line. Is that true?

Mr. CAIN. That is not always true, but it is true where you have a two-line rate. There is a difference, of course, in a one-line rate and a two-line rate on some roads. It is not universally true; but that is one of the points I make.

Senator MAYFIELD. And then the question of divisions is an important factor, too.

Senator FESS. I suggest that Mr. Cain be permitted to print this memorandum.

Mr. CAIN. If you will allow me to insert into the record pages 1 to 11, inclusive of this memorandum, I will just hand it to the reporter.

The CHAIRMAN. That may be done.

(The document referred to and submitted by the witness is as follows:)

[Extract from stenographers' minutes of hearing in Dallas, Tex., October 6, 1926, in re Finance Dockets Nos. 5679 and 5680, application of the Kansas City Southern Co. and application of Missouri-Kansas-Texas Railway Co., pp. 2093 to 2110]

A. The Paris & Mount Pleasant Railroad Co. was incorporated under the laws of the State of Texas on January 29, 1909. This railroad extends from Paris, in Lamar County, Tex., in a southeasterly direction, through Red River and Franklin Counties, to Mount Pleasant, in Titus County, Tex., a distance of 51 miles.

That portion of the railroad from Paris to Bogata, Red River County, Tex., a distance of 24 miles, was put in operation in October, 1910. This portion of the road was satisfactorily and profitably operated until June 15, 1913, at which time the second section of this road, from Bogata to Mount Pleasant, Tex., a distance of 27 miles, was put in operation, and the entire line was successfully and profitably operated until after the war period of 1917, after which time there was a continued decline in the revenue of the road due to the fact that all through traffic routed over this road was diverted, which resulted in a great loss of revenue.

Because of this loss of revenue and the greatly increased cost of labor and material, the physical condition of the property deteriorated. In February, 1920, I was appointed receiver of the Paris & Mount Pleasant Railroad Co. by the sixth judicial district court of Lamar County, Tex., and as such receiver have continued to operate this railroad until the present time. The necessary money was used by the Paris & Mount Pleasant Railroad Co. for the construction of its line from Paris to Bogata was secured through the sale of its capital stock and the execution of its demand notes to local banks, indorsed by its local stockholders and directors as security, and from cash donated by the citizens along its line of road.

After the line had been constructed from Bogata to Mount Pleasant out of funds advanced by the stockholders and directors, the road was valued by the railroad commission of Texas at $928,000. On this valuation the railroad commission of Texas approved and authorized the issuance of $853,000 of 6 per cent bonds, dated July 1, 1912. Of this $853,000 in bonds, $600,000 in bonds were sold and are now outstanding; $253,000 of such bonds are unsold and in the hands of the company.

In adidtion to the $600,000 in bonds outstanding there is $75,000 of common stock outstanding, all of which was sold and now owned and held by persons who are resident citizens of the State of Texas in the towns of Paris and of Mount Pleasant, and all of whom were in business or interested in business enterprises in these towns.

At the time this railroad was built the territory traversed was entirely without railroad facilities, all transportation was by wagon, roads were of the worst type and were impassable during rainy seasons.

The Paris & Mount Pleasant Railroad crossing Sulphur River Valley is the only all-weather crossing between State highway No. 39 and State highway No. 1-A, for a distance of 64 miles, air line. Highway No. 35 crosses Sulphur River Valley at the same location as the Paris & Mount Pleasant Railroad but it is not passable in wet weather and all of these country road crossings within this distnce of 64 miles are impassable in wet weather, and are very poor roads in the best of weather.

The soil along this line, between Paris and Bogata, a distance of 24 miles, is heavy black loam. It is very fertile and productive. I might say there, in addition, that principally in cotton during last year, we received approximately 30,000 bales of cotton produced along this section of the road and some little cotton from the section from Bogata to Mount Pleasant, but principally in this first section.

The soil along this line between Bogata and Mount Pleasant, a distance of 27 miles, is sandy. The fertile Sulphur River and White Oak Creek Valleys are in this section.

North of the railroad and within its territory there are over 40,000 acres of the finest quality of virgin timber, consisting of oak, ash, hickory, and other hardwoods. These timbered tracts are being cleared for land development in the various districts. In addition to this 40,000 acres of hardwood timber north of the railroad there are 50,000 acres of the finest quality of hardwood timber south of the railroad in the valley of Sulphur River, tributary to this road. The land on which this timber is located is the finest quality of alluvial soil and is being farmed as the timbered land is being cleared, thus producing tonnage which must be transported over the Paris & Mount Pleasant Railroad to market. That for the reason that it is impossible to cross this Sulphur River, and the traffic must move to this railroad to get to market.

As transportation north and south across Sulphur River Valley is not feasible on account of the great distance and numerous bridges to be built before reaching a market or means of transportation, this 90,000 acres which is being developed could ill afford to do without the transportation now afforded by the Paris & Mount Pleasant Railroad. Paris is now served by the Paris & Mount Pleasant Railroad, the Texas Midland Railroad, running from Paris to Ennis, and a branch line of the Texas & Pacific, the Gulf, Colorado & Santa Fe, and the Frisco.

Should the proposed system acquire the Paris & Mount Pleasant Railroad it seems to me that many economies could be effected by reason of the elimination of all of the general expenses and supervision which could be easily handled by the present staff of the Cotton Belt without additional cost. The same is true with regard to the maintenance of equipment. The shops at Paris, now maintained by the Paris & Mount Pleasant, could be discontinued and the work done better and cheaper in the higher-grade shops of the Cotton Belt at Mount Pleasant and Tyler. It would seem as though the Paris & Mount Pleasant could be operated at a very materially reduced cost. However, at the present time the road is being operated efficiently and as economically as is possible under present conditions, all of which will be shown by the exhibits presented by Mr. Brantley, the auditor.

The Paris & Mount Pleasant Railroad is financially weak, is in the hands of a receiver, and at a great disadvantage because of this. It has been unable to make needed capital investments. These investments would have enabled it to secure additional traffic. It has lost many industries on account of its inability to finance the necessary improvements to secure them, and has lost some of these industries because of the fact that the owners of these properties were in doubt as to the ability of the Paris & Mount Pleasant Railroad to permanently continue operations. All of these difficulties would be overcome if this road was included in the Loree group, which would certainly be a strong system as to which the public would have assurance of permanent adequate transportation service capable of holding its own against all the other large systems formed and being formed in this Southwestern territory.

As illustrating some of the losses sustained on account of the weak financial condition of the road, I submit the following:

Two or three years ago while an oil refinery was seeking a location in Paris, every effort was made to locate this refinery on the tracks of the Paris & Mount Pleasant Railroad, which would have been done had the owners of the refinery not been doubtful of the continued operation of this road and its ability to provide adequate service for the refinery, which was therefore located on the Santa Fe line in Paris and is in operation to-day.

Another case: While there are a few sawmills located in the 90,000 acre hardwood timber belt along this road we have never been able to induce operators of large sawmills to locate on this line, which would enable the

owners of the timber to dispose of it and get this very fertile land in cultivation. The mill owners, in each instance, have declined to undertake the establishment of a large mill for the reason that they do not feel sure that this road would continue to be in operation long enough for them to get out a reasonable cut, and for the further fact that this road is unable to stand the expense of building the necessary spurs and extensions, which would greatly induce the location of such enterprises. However, had a strong system been in control of this road doubtless more of the land along it would have been cleared of its timber, yielding continued revenue to seller and carrier. At the present time trees valuable for lumber are being poisoned and burned in order that the land may be cleared for cultivation, this due to the lack of transportation and also from the high transportation cost from the Paris & Mount Pleasant Railroad points to mills, occasioned in part by two line hauls. Thus timber, which is badly needed in other parts of the country, is being destroyed, much against the public interest.

Another case: The Gulf Refining Co. has recently authorized the building of a new distribution station at Paris which will probably cost $100,000. Negotiations have been carried on by this road to secure this industry on its switch tracks but we have been unsuccessful and the industry has located on the Santa Fe tracks in Paris. I understand that one of the officials of the Gulf Co. many times asked the question about the continued operation of the Paris & Mount Pleasant Railroad, and I believe that the reason for the location of this industry on tracks other than the Paris & Mount Pleasant was because of the doubt in the minds of the Gulf Co.'s officials of the financial strength and the continued operation of this road.

Another case: Recently, while soliciting a large shipment of cottonseed oil moving out of Paris to New Orleans, our representative was informed that our line would not be favored with this shipment as we were in receivership, weak financially, and the shipment was so valuable that should it be damaged or destroyed by us the shipper had doubts as to his ability to collect his damages.

Owing to its limited financial power this road has for many years been prevented from extending its switch-track facilities, so that it might serve many of the larger industries, and has thus been deprived of much traffic which it would otherwise have enjoyed. By the expenditure of a reasonable sum we could build a switch track which would serve four of the largest industries in Paris. By another reasonable expenditure the track could be extended from the southwest part of Paris, where this road enters the town, to a point within three blocks of the heart of the business district, making available many valuable industrial locations. This same condition exists to a more or less extent at all stations on this line—a condition which could be cured by reasonable and necessary investment of capital which this road is now unable to make, but which could and no doubt would be made if this line was included in the proposed group.

Another great disadvantage is illustrated by a large flour and feed mill located at Paris which handles a large tonnage of grain and feed. This mill now operates from grain secured from points of origin on the Missouri Pacific system, hence the Texas & Pacific Railway enjoys practically all of the mill's business. For many years this mill has endeavored to have transit privileges established for its use, so that grain purchased at Kansas City might move via the Kansas City Southern to Texarkana, the Cotton Belt to Mount Pleasant and the Paris & Mount Pleasant to Paris, there milled and the product reshipped to points in Texas. The Kansas City Southern and Cotton Belt have so far failed or refused to establish this privilege and hence this mill is forced to confine its purchases largely to Missouri Pacific points of origin and sales. Should the consolidation here applied for be granted and the Paris & Mount Pleasant Railroad be included and this reasonable transit arrangement carried into effect, not less than 200 carloads per annum of grain and grain products in and out of Paris may be safely depended on as additional traffic. Thus the mill's territory would be extended and the business enlarged, which would certainly be in the public interest.

During 1925 the farmers around Bogata on this line produced many carloads of potatoes, onions, watermelons, and like crops. They were unable to find a market for them and the crops rotted in the field. They appealed to the railroad for help but as we had no agricultural department to assist in marketing, no cars nor other facilities for handling this character of traffic, we were unable to aid them, thereby losing approximately 150 carload shipments and the revenue therefrom. Had this road been able to maintain an agricultural department which would have aided in marketing these products, it could have given these farmers material help in saving their crops, and would certainly have been in the public interest as it would be done if this road was included in the proposed group.

If the consolidation or merger or control by stock purchase of the Kansas City Southern, Missouri, Kansas & Texas and the St. Louis & Southwestern Railways, being here considered should be approved by the commission, it is my opinion that in the public interest, suitable provisions should be made for the acquisition of the short or weak lines connecting with the applicant lines. Particularly should the Paris & Mount Pleasant Railroad Co. be included, as its earning power, as shown by its income account statement and financial report, shows conclusively that it can earn its way, and would not be a burden on the Cotton Belt or any other line in the proposed system, but on the contrary would be amply able to maintain itself and it would certainly be greatly in the public interest to have the Paris & Mount Pleasant included in the proposed group, thereby giving it the benefit of a strong financial standing, the service and other great advantages which it does not now enjoy.

Should the Paris & Mount Pleasant not be included in the proposed group and the management should see fit to divert the Paris traffic from the Cotton Belt to the Katy and move this traffic into Paris from Greenville over the Texas Midland, that principally refers to traffic out of St. Louis or from Dallas, it would destroy the Paris & Mount Pleasant just as it did in 1917, 1918, and 1919, and would result in the abandonment of the line, which would be very disastrous not only to the people living immediately adjacent to the Paris & Mount Pleasant but extremely adverse to the general public interest.

Since passage of the transportation act, incorporating the purpose and policy of Congress to not only permit but certainly bring about the consolidation of all the railroads into a limited number of systems, the Paris & Mount Pleasant, like other short-line railroads, has had to abandon any plan for extension or expansion, because capital can not be induced to invest in such property, for the very reason that combinations such as proposed in this proceeding can and will draw to their own powerful systems all industries and can and will take from the little road all competitive traffic. The Paris & Mount Pleasant should go with the St. Louis & Southwestern. It logically and undoubtedly belongs with this road. As I have already pointed out, the Paris & Mount Pleasant can not hope to develop its traffic possibilities because of competition of the major concerns rapidly combining into powerful systems, nor can it extend or otherwise protect itself against such a situation. The very fact that the large systems may be formed, as here proposed without including it, necessarily affects the financial integrity of the road; and without it is grouped in one of such systems I can not but conclude that it would eventually dry up, although it is now making a good showing as to earning power.

Q. Well, Mr. Wortham, something has been said with regard to the difference in wages or difference in operating the short-line railroads and trunk-line railroads. You admit, I imagine, that there is a difference in wages,—A. There is.

Q. Will you give us your judgment, best judgment, as to what is the difference in the wages—the wage scale on your road, and on trunk lines with which it connects?—A. My investigation shows that the difference in the wages paid by our road and the standard rate of pay is between 15 and 20 per cent. I should say in our particular case, 20 per cent would be ample.

Q. Twenty per cent difference. Without going into details, unless you feel that you ought to do so, are you able to state whether or not this difference in operating cost is offset in other ways?—A. If the property should be operated by the Cotton Belt?

Q. Yes.—A. Not only offset, but there would be a great saving to the Cotton Belt.

Q. Do you mind stating in what particulars?—A. Well, to be exact, take our property for instance. We estimate that the wages affected by this difference is approximately $60,000 per year, and if the wages were increased 20 per cent, it would be an increase of only $12,000. The saving the Cotton Belt would make to offset that would be a saving in the shop, which now costs us around—this is approximate, of course—about $7,000.

Q. What do you mean, $7,000 a year?—A. Yes; to operate our repair shops, they could probably do that in their efficient shops for half that much, or at least a saving of $3,000. They would save all of the terminal expense at Mt. Pleasant because they have adequate facilities, which would be a saving of

$6,000, and that is the expense of the station operations there and terminal expense, which they would not have if they were operating the property. In other words, in addition to the difference in wages, there is a clear saving to them of between $12,000 and $15,000, in my opinion.

Q. Would there be any difference in the matter of per diem?—A. I am not taking that into consideration. Our per diem last year ran something over $17,000, if I remember correctly.

Q. You don't know what that difference is?—A. I don't know what that difference would be. I will say in fairness, however, that there would be an increase probably in their taxes, but I take it the per diem increase would offset the taxes.

Q. Mr. Wortham, your line has been finally valued by the commission for rate-making purposes?—A. It has.

Q. Are you familiar with the statement made on the finding of the commission in the order in your case as of July 14, 1924, reported in 84 I.C.C. 369?—A. That is the valuation?

Q. Yes.—A. Yes, sir, I am, $213,000——

Q. (interrupting). Never mind, I am not asking you to state that. Has there been any difference in the items listed there between the date of that order and the present time? In other words, the order gives the location and general description of your property, traffic connections, physical conditions, physical conditions affecting construction, economic conditions relating to traffic and corporate history. Has there been any change?—A. Practically none.

The CHAIRMAN. Let us assume that there are 50,000 miles, approximately, of weak lines in the United States. Let us assume that something has to be done to relieve them or they quit and go on the junk pile and transportation over them would be then discontinued. The question is whether or not the passage of an act of this character will relieve those lines and enable them to be absorbed and taken into the larger system; and, if not, what is the remedy?

Senator MAYFIELD. Before you get away from that, I want to ask this question in connection with it, Mr. Cain.

Is not the great thought underlying the whole question of railroad consolidation to take care of these weak or short lines?

Mr. CAIN. Undoubtedly that is true, Senator, and it has been true for——

Senator MAYFIELD. That is the history of it?

Mr. CAIN. Yes, sir. The weak-line problem became acute when the roads were taken over for the first time in the history of this country as a unified system. It was then insisted that they were weak and that the Government ought not to take them over.

Senator MAYFIELD. To permit the great, strong, large, healthy railroad to consolidate without taking care of the weak lines, would not that have the same effect as the Government's taking over the carriers during the war and leaving out the short lines?

Mr. CAIN. I think it would; and I was just about to come to this suggestion, that if members of the committee are of the same opinion that Congress has been for the past years, in other words, if the importance of these weak lines is recognized and the members of this committee agree that they must be taken care of, then it would be unnecessary for me to proceed any further as to the importance of the weak roads and the need for remedial legislation.

The CHAIRMAN. Otherwise, the policy of consolidation is futile; it would be nugatory.

What we are interested in is to see wherein this bill fails to take care of them.

Senator MAYFIELD. You want to be absolutely sure, because that was the great argument put forth in behalf of the transportation act of 1920; but what the little railroads have got out of that you can put under your thumb-nail.

Senator FESS. I think, Mr. Chairman, that no one has ever stated the situation more clearly than Senator Cummins when he put his alternative—"the short lines are not going to be abandoned, because the public won't permit it."

Senator MAYFIELD. Are they going to get any help?

Senator FESS. If we do not find the solution by consolidation, then it means Government ownership. It strikes me that that is the alternative.

Senator SMITH. What provision in this bill have you made to force, in the process of consolidation, a percentage or a part of the weak lines in each consolidated project so that you can take care of the situation?

Senator FESS. We give to the Interstate Commerce Commission the power to do that—to say that "unless you include this line there is no consolidation." Of course we do not make compulsory consolidation. If they say they will not take it in, then the penalty is that no consolidation will follow.

Senator MAYFIELD. The result will be that we will have 15 or 16 or 17 districts of large consolidated railroads and then have the short line still on our hands.

Senator SMITH. That is exactly what you will have; and not only that, but we incorporated in that wonderful piece of legislation, known as the Esch-Cummins Bill, that they were given plenary power to determine whether a new road was needed or an additional road was needed, and they would issue a certificate of convenience and necessity. I have a case right in my State right now that smells to heaven.

Senator SACKETT. Mr. Cain has studied this matter and he can tell us, if he will, wherein this bill fails to take care of that line. That is the point that we are interested in.

Mr. CAIN. Senators, this bill of course does not completely take care of the weak railroads. I do not believe that it is practicable or possible at the present time to do that. We must bear in mind that this is a tremendous problem, and at the bottom of it is finance. You have got to reckon with the financial interests of this country as well as those who are in charge of the railroads.

Senator SMITH. Will you not have a tremendous amount of money in the recapture fund? Have you not got a reserve fund piled up that you can tap?

Mr. CAIN. It has not piled very high; and if it were higher than this Capitol we could not touch it, because none of us are able to qualify.

Senator SMITH. That is the point that I am making right now, and I want you to get down to the facts here and show us wherein this bill fails to do what we loudly proclaimed we were doing in the Esch-Cummins Act—take care of the weak roads.

Mr. CAIN. You remember, Senator, and I am sure you are in complete accord with the idea of Senator Cummins, of incorporating something in the law that would induce the larger lines when they did consolidate to take in the short-line railroads. We cannot have compulsory consolidations. I think we all must agree to that.

Senator MAYFIELD. We can have something else that will make the big railroads take the "blue John" along with the cream. You are from Texas and you know what that expression means.

Mr. CAIN. Yes, I do, Senator.

Senator MAYFIELD. I do not want them to be able to take all the cream and then leave the "blue John" out. I want them to take the bad along with the good.

Mr. CAIN. I think, Senator, that that must be done if we are to escape the consequences of the competition on the one hand with the great giant systems that are being formed and, on the other hand, with the tremendous transportation agency that is being built up in this country through automobile competition.

Senator SACKETT. What do you suggest?

Mr. CAIN. I am in favor of the adoption of this bill with some little changes that I want to suggest to the committee.

I go, first, to section 202 of the proposed bill.

May I inquire whether you have the bill that was prepared by the committee of the railroad association? Are you using that, Mr. Chairman, or are you using Senator Fess's bill?

The CHAIRMAN. I think the one we are using is the one prepared by the committee. We had it printed.

Senator SMITH. This is the Fess bill of December 6.

Mr. CAIN. I have the one proposed by the law committee of the railroad association in which the Fess bill is printed along with their suggested changes. The only thing is that the pages will not be the same. That is the reason I was asking that question.

The CHAIRMAN. We can hunt it up.

Mr. CAIN. Referring to section 202, that is the first section I want to discuss.

There has been proposed, and it has been discussed very exhaustively before the House committee, a change in section 202, that is, in the House it has been proposed to substitute the specific declaration of policy that might be termed the preamble to the Fess bill with a mere authorization called "authority for unification."

Senator FESS. That is the proposal we are going on now. It is not in this bill.

The CHAIRMAN. Ought we not to have it direct and specific and as nearly a mandate as we can possibly put in language? Congress can not make these consolidations, but it ought to be an announced policy stated in such direct terms that the Interstate Commerce Commission must follow it. As to whether or not it is intended to follow that up by conferring the power of eminent domain to enable them to take hold of a weak line if they refuse to consolidate, or just how far we are going in that, is a different question.

Senator SMITH. Is it your idea, Mr. Chairman, that wherever consolidation is proposed within a given territory it shall be mandatory upon them to take in contiguous weak lines that lie within that territory?

The CHAIRMAN. I do not think you can make it mandatory.

Senator MAYFIELD. They will never do it, then.

The CHAIRMAN. I do not think you can do that.

Mr. CAIN. Mr. Chairman, the proposal of the railway association as set forth in the Parker bill of the House does not contain a specific declaration of policy. I think that is a mistake. If consolidation

is the policy of this Government, the Congress should say so. Congress should declare it to be a policy so that the commission would not sit back in a judicial attitude, but would understand that it must do all it consistently can in its place as an agency of Congress to bring about the accomplishment of that policy.

The CHAIRMAN (reading):

It is hereby declared to be the policy of Congress in order that an adequate and efficient transportation service may be retained.

Do you want to make any changes in that?

Senator FESS. We have abandoned that idea in the bill.

Senator DILL. Have you abandoned this expression: "Preserve effective competition and abolish wasteful competition"? I notice that is in this declaration.

Senator FESS. The only thing we have abandoned, Senator, is the utterance of a declaration that it is the policy of the Government to establish consolidation. I thought we ought to hold that, but they abandoned it in the House earlier, and when I introduced the modified bill I introduced the bill with that out.

Senator SMITH. You say the House abandoned the idea of consolidation?

Senator FESS. No; the declaration of policy.

Senator SMITH. That amounts to the same thing.

Mr. CAIN. If you will permit me, I should like to give you the benefit of my views with regard to the proposed change in the House so that you may have it before you for whatever it is worth, either now or in conference, if it goes to conference.

Section 202 as proposed—and I suppose that is what you have reference to, Senator Fess—reads as follows; it is headed "Authority for unifications."

The unification, through any method or procedure provided for in this title, of carriers or property of carriers, is hereby authorized, and the commission shall carry out the provisions of this title in such manner as in its opinion will protect the public interest, preserve necessary weak or short lines, prevent any undue lessening of existing carrier competition in service in cases where such competition is deemed by it essential to the public interest, and bring about ultimately the establishment of a number of strong, efficient, and well-balanced systems calculated to facilitate simplified and more effective regulation, to promote economy, to afford better service, to maintain as far as practicable the existing routes and channels of trade and commerce, to eliminate unnecessary duplications and wasteful competition, and to provide the advantages of competition between the systems so established.

Senator SMITH. Have you read there what is proposed in the present bill?

Mr. CAIN. Yes. That is what seems to be proposed here and in the House.

I criticize some phases of that declaration. In the first place, I say that we prefer very much a specific declaration of policy. Of course, that will be interpreted to be a declaration of policy, perhaps, and therefore it is not so important except that it looks like we are retreating. It looks like we are backing away from the position the Congress has heretofore taken or the committees have heretofore taken when we abandon a specific declaration of policy, because it is in every bill that has been introduced since the first bill after the passage of the transportation act of 1920.

Senator SACKETT. That does declare a policy, though.

Mr. CAIN. Yes, sir. But I think the reasons for the declaration of policy are not stated as they ought to be.

I prefer that the preface to those various factors should be something of this character:

In order that adequate and efficient railroad transportation may be maintained in the United States—

That is the first statement in Senator Fess's bill—

the unification, through any method or procedure provided for in this title.

Following the phrases that are set forth in this unification in the House bill. But I criticize these features of this declaration:

And the commission shall carry out the provisions of this title in such manner as in its opinion will protect the public interest.

I do not like the words "protect the public interest." I think that carries with it the implication that if the public interest is not injured or is not attacked in some way, then the commission would have to permit authorization, if that was the only point that it was taking into consideration.

Senator DILL. Is there anything in the law that meets our situation in the Northwest now, where the Great Northern and the Northern Pacific want to combine and their combination, of course, means a tremendous advantage as against the Milwaukee? You say, "Protect the public interest." There is a railroad interest to be protected. I do not represent the Milwaukee; I do not want to be misunderstood about that, but that kind of a situation may arise in the Southwest where two great competing lines want to combine and their combination means a tremendous advantage over the other line, and the commission says, "We do not know what to do about this." They seem to be up in the air. I do not know what should be done.

Senator FESS. Mr. Cain, you well understand that the phrase "protect the public" means that the consolidation which people are afraid might get into a trust fund and take advantage of the public by eliminating competition, means that what we do must be in view of our effort to protect the public.

Mr. CAIN. You have never used that expression in any of the previous instances where the phrase "public interest" has been used. You say "in the public interest" or "compatible with the public interest," and phrases of that kind, but never the phrase "protect the public interest."

I can conceive of a case where, if I were sitting on the bench of the commission and two carriers came before me for authority to consolidate, and that were written into the law, and the carriers said, "We are not doing any harm to the public interest at all," I would be compelled, it seems to me, if the public interest was not actually in jeopardy, to allow that unification.

The CHAIRMAN. What do you propose in its place?

Mr. CAIN. I think this, Mr. Chairman, that the question of public interest is so broad and so far-reaching, and yet so limited—it may be the general public interest, it may be the public interest of a locality—that I have proposed to change this, and I want to submit to you, gentlemen, the form of declaration which I think might well be substituted for the one in this bill, and I will do it right now, although there are other features of the declaration that I perhaps ought to explain to you. But I will present it right now. In other words, I think that the policy of mere protection of the public interest in hazardous.

I would suggest a substitute of this kind:

In order that adequate and efficient railroad transportation may be maintained in the United States—

and I digress here to say that the Supreme Court of the United States in a number of cases, which began with the C. B. & Q. case, which was the first one heard, on down to the last case decided, has reiterated the statement that the purpose of the transportation act is to furnish to the United States adequate transportation, a transportation system, to use the language of the Supreme Court, capable of promptly transporting all of the interstate traffic of the country. So I think that it might be stated that—

In order that adequate and efficient railroad transportation may be maintained in the United States, the unification, through any method or porcedure provided for in this title, of carriers or property of carriers, is hereby authorized, and the commission shall carry out the provisions of this title in such manner as in its opinion will prevent any undue lessening of existing carrier competition in service where such competition is deemed by it essential to the public interest, preserve and stabilize necessary weak and/or short lines, and bring about ultimately the establishment of a number of strong, efficient, and well-balanced systems, calculated to afford better sevice, to promote economy, to facilitate simplified and more effective regulation, to eliminate unnecessary duplications and wasteful competition, having due rgeard to the advantages of competition between the systems so established, to maintain as far as practicable the existing routes and channels of trade and commerce, and to otherwise protect and/or promote the public interest as it may be affected by the unification of railroads or railroad properties as provided for in this title.

Senator DILL. You make the central point of your idea that it is essential to the public interest?

Mr. CAIN. Yes, sir; and to promote the public interest. I do not think, in other words, that carriers should be permitted to come up and consolidate unless it is going to benefit or promote the public interest.

The reason I suggest the inserting of the words "preserve and stabilize necessary weak and/or short lines," is I feel that the word "preserve" there is like the word "protect," it merely assumes that if a short-line railroad or weak-line railroad is not injured by whatever is proposed, therefore the commission would be required to grant the application.

There is one other factor or principle in their declaration that has been challenged by Mr. Fulbright of the National Industrial Traffic League. Where the expression "prevent any undue lessening of existing carrier competition or service" is used, he has suggested the substitution of the word "substantial."

I think that would be disastrous. I think if you insert the word or substitute the word "substantial" lessening of existing carrier competition it would be almost impossible for any two carriers that compete at all to ever consolidate. I think the phrase "undue lessening of competition" is all-sufficient; and in that connection I want to read you just a short paragraph from the decision of the

commission in what we commonly call the Loree Consolidation case. The commission says in its opinion:

> Although there is strong competition between the M. K. & T. and the Cotton Belt on traffic moving between northern Texas and St. Louis or through the St. Louis gateway, and also strong competition between the M. K. & T. and the Kansas City Southern in many places, the testimony shows that for a large portion of their traffic these roads are not competitors. A certain amount of interference with competition is involved in nearly every railroad combination that may be formed, but if this interference is not unduly great, if effective competition is preserved at all important points, and particularly if the tendency of the combination is to increase and promote other competition to compensate for that destroyed or lessened, the combination may well merit our approval if it is otherwise shown to be in the public interest.

Then it goes on to say that in the Nickel Plate Unification case (105 I. C. C. 405), the commission said that a greater amount of actual and effective competition in service may be assured by a limited number of well articulated systems than by a greater number of systems less complete.

Senator FESS. You think "undue" is preferable?

Mr. CAIN. I think it is far preferable. I think "substantial" would be destructive.

Senator FESS. I think that was the idea of the committee from Mr. Fulbright's testimony.

Mr. CAIN. In that connection, if you refer to Mr. Fulbright's testimony in January, 1927, he made a very strong argument in favor of the use of the word "undue." Indeed, it was inserted at his suggestion.

As the time is short, I will leave that section with the suggestion of the amendment I have proposed, and I next call your attention to section 206. We will begin at line 18:

> Such carriers, and any governor so notified, or any representative of the State designated by him, and subject to such rules as the commission may prescribe, any other person having an interest shall be afforded a reasonable opportunity to be heard.

As you know, I represent an association. It is neither a natural nor an artificial person. The use of the words "other person" there, which is the only expression that could include us, seems to me to be too limited. I suggest the substitution for the two words "other person" the word "one," so that it would read "anyone having an interest shall be afforded a reasonable opportunity to be heard."

That would authorize a chamber of commerce, or an association, or any number of citizens who did not come within the strict meaning of the word "person" to be heard.

Senator SACKETT. The question is whether the word "person" comprises an association.

Mr. CAIN. An association or an unincorporated organization.

Senator FESS. You think the word "anyone" is broader than "any other person"?

Mr. CAIN. I think the word "anyone" would include, necessarily, any unincorporated association.

Senator FESS. The committee will consider it.

Mr. CAIN. In connection with this section I also want to refer for a moment to a suggestion made by a gentleman who appeared before this committee, Mr. Moore, who is general counsel of the Loree interests. I am addressing myself still to section 206, but in

connection with 206 I ask the committee to refer also to section 207, on page 12. Beginning at line 23, on page 11, I will read that, because I can express it in connection with this section 206, and I think it is pertinent:

> The carriers and the commission shall give due consideration to the inclusion in the plan of short and of weak carriers in the territory involved; and in order that the provisions of section 202 may be carried out the commission is directed to make and have available for its use a study of the short and weak carriers——

The CHAIRMAN. From what are you reading, Mr. Cain?

Mr. CAIN. I am reading from the proposed bill of the railway executives.

Senator FESS. Section 207, on page 11, beginning with subsection 2.

Mr. CAIN. I am using that text, Mr. Chairman, because we have a very complete statement made by Colonel Thom. He and I do not differ, except in some minor particulars, as I am trying to point out. Mr. Moore appeared before you and, in reference to this last section that I read, suggested an amendment which I will read in order that you may have it before you. He suggests this wording:

> The carriers and the commission shall give due consideration to the inclusion in the plan of short and of weak carriers in the territory involved; and in order that the provisions of section 202 may be carried out, the commission may, then or subsequently, make any other carrier or carriers in that group or region parties to the proceeding, and, after hearing, may make such orders relative to the allocation of the short and/or weak lines therein as the public interest may require.

I think I know why Mr. Moore makes that suggested amendment to the committee. In the hearing of the Southwestern Consolidation case——

Senator SACKETT. Excuse me. Do you agree with that?

Mr. CAIN. I agree with it, Senator, in principle, because there will be cases such as this. I think it happened in the case to which he refers—the consolidation case that we call the Southwestern Consolidation case. You may recall that in a previous hearing I directed attention of the committee to the Fort Smith & Western as a road that should have been taken over by the Kansas City Southern-St. Louis Southwestern and M. K. & T. consolidation, or proposed unification. It was asserted, in reply to our contention that that road should be taken in, that it properly belonged to the Missouri Pacific system. Unfortunately, the Missouri Pacific system had almost become complete before anybody awoke to the fact that while it was forming or completing such a combination, some other short-line railroads, than were taken over by it, ought to be taken over.

Permit me to say, gentlemen, that there have been 163 applications for consolidation presented to the commission up to this time, and with exception of the Southern Pacific's absorption of what are commonly called the Phelps-Dodge lines, the El Paso-Southwestern lines, and some major carriers absorbed by the Missouri Pacific system, all those one hundred and sixty and odd cases where authority was given to unify were short roads. I think that is very helpful and very encouraging, because I think it shows there is a disposition on the part of the roads proposing to consolidate to take over all the roads that they think they can use to advantage.

I think they are like you and me. Unless you present some sort of indirect inducement or the pressure of self-interest is brought

into it somewhere, they will, of course, take, as Senator Mayfield suggests, the cream and leave the whey.

Senator FESS. It is true that there has not been any great major merger or consolidation under the present law?

Mr. CAIN. None, Senator.

As I say, the most important consolidations were where the Southern Pacific was permitted to acquire the Phelps-Dodge lines, and the Missouri Pacific was permitted to acquire the Gulf Coast lines and the I. G. N., which are lines of some magnitude.

Senator DILL. Are there many pending or requested by the big systems?

Mr. CAIN. At the present time the Chesapeake & Ohio is seeking to have approval of the commission to acquire the Erie and the other roads known as the Nickel Plate roads; and the Great Northern and Northern Pacific, through a holding company called, I think, the Great Northern Pacific Co., are seeking to acquire the Great Northern and Northern Pacific. Of course, they will automatically acquire the Burlington if that is done, because the two roads own 97 per cent of the stock of the Burlington.

The New York Central is also seeking to acquire, or consolidate, or merge the Big Four and the other roads that are owned by it so far as stock is concerned.

The Loree application has not been refiled, but it is understood they are getting ready to file application again.

I started to say that the Missouri Pacific system——

Senator DILL. Before you leave that, do these applications include the short or weak lines in their area?

Mr. CAIN. They have never, in a single instance, where they have filed applications, proposed to take in any short-line railroads. In the Nickel Plate case the commission rejected the application, and said, incidental to the decision:

> But the importance of the problem of the short lines in their relation to this subject can not be too strongly emphasized. One of the chief criticisms of the unifications which have been proposed or suggested has been that certain of them do not embrace related weak lines, although the union of the weak with the strong lines is one of the ends which Congress apparently had most definitely in mind. When these unifications are being considered the problem of the short lines whose property in the public interest should be included in the systems proposed can not be overlooked if it is possible to include them upon reasonable terms. In this instance little or no consideration was given to the short-line connections of the lessor companies in the preparation of the plan, but on the contrary, as has been pointed out, it is proposed to leave out some of the weaker units of the Erie. It is apparent that such a policy nullifies one of the intentions of Congress in enacting this legislation. Every applicant should assume the burden of making reasonable provision in its plan for the possible incorporation of every connecting short line now in operation in the territory covered or to be covered by the proposed grouping or unification. No branch line or short line now in operation within the territory in question should be left out of the consideration unless by affirmative testimony the abandonment of operation of such line or its omission from the plan has been justified.

Senator FESS. From what are you reading?

Mr. CAIN. From the decision of the commission in the Nickel Plate case.

I think that is as strong as this law, so far as that is concerned, but the point I am discussing with you now is one of the developments—I will not call it a weakness, but the lack of sufficient machinery to enforce what the commission proposes here.

Senator DILL. The commission rejected that application.

Mr. CAIN. The commission rejected it, but not upon that ground. That was incidental to the decision.

Senator FESS. That comment of the commission is in keeping with this provision. Whether the party is an intervener or not, the commission can deny consolidation unless it take in the short lines.

The CHAIRMAN. Yes.

Mr. CAIN. Coming to this proposition of Mr. Moore's as I say, it developed in the hearing of the Southwestern case, where I intervened—if you will pardon the use of the personal pronoun—for the American Short Line Railroad Association and asserted that it was the duty of the proponents of that unification or unified system to bring in all the short lines that connected with it, in order that the commission might determine whether or not a conditional order should be imposed. The suggestion was made that "here is a road that somebody ought to take care of, but not us. It ought to be taken care of by the Missouri Pacific system."

The Missouri Pacific system is complete, practically. Mr. Williams, who has appeared before you, intimates that they may go on and take some other short line roads, but he said in a previous hearing that it was practically complete.

There is no way in which the commission can deal with the Missouri Pacific under this bill or any other bill that I can think of, but it could do this. The commission could require the proponents or the applicants to make parties of all of the short and weak railroads that connect with its proposed system, or connect with its proposed system and another system not before the commission. The commission can then bring the other system, using the Missouri Pacific as an illustration, before it for the purpose of making an order, not going any further than saying "Here is an orphan that we leave on your doorstep, or that we think should go into your household." The commission can not make the Missouri Pacific adopt it and give it its name; but if they put it on its doorstep, public opinion is directed to the Missouri Pacific as having been selected by the commission as the parent or the foster parent of one of these small carriers, and I do not think the Missouri Pacific could stand the pressure of public opinion. If it did, the commission, having allocated it to the Missouri Pacific system, could use every power that it has under the interstate commerce act to require the foster parent to take care of that baby. In other words, it could enforce divisions. It could enforce the distribution of cars. It could require it to treat it just as it would treat a member of its own household, upon the theory that Congress has directed the commission to give them sufficient food for all the family that it makes for them, and the commission could say "We have provided that food. Now, you must distribute it."

It is an indirect pressure that I think would bring about the absorption of a road of that kind. I think it might be a serious mistake to compel the Kansas City Southern to take a road, for instance, that ought to be allocated somewhere else in the public interest.

Senator SACKETT. Do you want to go any further than that moral pressure? Do you want to give the short line road the right to file a petition to be taken in, and require that it be taken in?

Mr. CAIN. I have suggested this amendment in lieu of the one Mr. Moore proposes as a part of section 206, or at the end of section 206, which refers to notice to the parties. I will read the last of that section:

> Such carriers, and any governor so notified, or any representative of the State designated by him, and, subject to such rules as the commission may prescribed, anyone having an interest, shall be afforded a reasonable opportunity to be heard.

Then I add—

> *Provided*, That rules prescribed by the commission may authorize any intervener or party to the proceeding to move the commission for an order to bring before it as a party any other carrier or carriers in the territory involved in the plan; and, after hearing, the commission may make such orders relative to the allocation of the short and/or weak lines made parties to the proceeding as the public interest may require.

Senator SACKETT. That does not go very far toward giving them any power.

Mr. CAIN. I think they have the power now, but they will not exercise it. I have had experiences of that kind. I will say to you, gentlemen, that after conference with my associates I addressed a letter, as general counsel of the association, to the commission, requesting it to adopt procedure such as this, pointing out the fact that it was important in the public interest that if they were going to pass upon the question as to whether any road should be allocated to a particular proposed system, that the roads that might be allocated be before it; but the commission declined to either act upon my suggestion of making rules or of permitting a public hearing on the question. Therefore, it seems to me that the commission ought to be impressed with the importance of it. I do not know whether they hold that they have the power or have not the power.

Senator SACKETT. Suppose you put that language in the bill. It would be up to the commission, still, to make rules.

Mr. CAIN. Yes; it would.

Senator SACKETT. It would not aid the thing at all if it is in there now.

Mr. CAIN. I think you have to give them very broad discretion.

Senator SACKETT. They have that now. Your letter shows that they could do it if they agreed with your point of view.

Mr. CAIN. I think that that is preferable to the one Mr. Moore has suggested, but, as I say, I do not object to that. I would rather have that than nothing.

Now if you will again refer for a moment to paragraph 4 of section 207, this is the only case where Colonel Thom and I perhaps differ in material way. Paragraph 4 of section 207 reads:

> The commission may from time to time, for good cause shown, upon petition of the carrier or of its successor in interest, which under the plan acquires the property of another carrier, make such order supplemental to any order issued under this title as it may deem necessary or appropriate.

My interpretation of that—and I think it is correct—is that nobody except a carrier that had been authorized to acquire another carrier could reopen a consolidation case for the purpose of a supplemental order.

I make the distinction between an order authorizing the acquisition of one carrier by another carrier and a supplemental order that might ultimately authorize the acquisition of still a third carrier. Of course, the reply to that is "but the carrier that acquired the property is the one to say whether it wants to acquire other property."

I think that if that is to be changed so that you are to leave that paragraph in the shape it is written, then it is very necessary that these small and weak carriers be brought into the hearing in some sort of shape, because I know of cases where consolidation or unification has occurred and nobody knew anything about it except the two carriers that were interested. Of course, they publish it, but publication in a State in some obscure paper does not call the thing to attention.

The suggestion was made by Commissioner Hall that we were here. But we do not represent all these roads. There are roads that are very important to the public that we do not represent. All we try to do is to give notice to our member lines, somewhere near 500 lines out of 600 or 700.

Senator FESS. Do you approve the suggestion of Commissioner Hall, when he suggests that you omit all of line 13?

Mr. CAIN. Yes, sir; I do.

Senator FESS. Down to and including the word "carrier" in line 15?

Mr. CAIN. Yes, sir; I suggest that that be eliminated, so as to read:

> The commission may from time to time, for good cause shown, make such order supplemental to any order issued under this title, as it may deem necessary or appropriate.

Senator FESS. That was his suggestion. That would leave it unlimited.

Mr. CAIN. Colonel Thom, of course, wants to be heard on that. He and I, as I say, do not agree on it, but I thought you should have the benefit of my views about it.

If you are not going to exclude the language suggested there, then I think either the suggestion of Mr. Moore or my suggestion of an amendment ought to be incorporated, so that there will not be a case such as occurred here within the last month. The Southern Pacific bought the Texas Midland Railroad, and the argument was on before the commission and heard before I knew about it; that is, before I knew that the argument was to be heard and that the commission was passing upon that question. So that it might occur that the public interest would be jeopardized if there is not some kind of procedure that will bring in all these little railroads that are in the territory involved.

Senator FESS. Mr. Cain, that is one of the suggested amendments that is open for consideration. There are several here that the committee has not taken up.

Mr. CAIN. Section 207, of course, gentlemen, as a whole, is exceedingly important to the short line railroads. It is the one section of the proposed bill that I think takes care of the short line railroads in connection with the declaration of policy. There is one part of section 207 that has been criticized.

Senator FESS. Subsection 2?

Mr. CAIN. Section 207.

Senator FESS. I mean subsection 2 of section 207?

Mr. CAIN. No. It is a part of section 1. It is Mr. Williams's idea.

If the order of the commission (whether or not any intervener's petition has been filed) imposes as a condition to the approval of the proposed unification that a carrier not joining in filing the petition be made a party to the unification, the carriers filing the petition may report to the commission, [etc.]

In other words, that part of section 207 authorizes the commission to bring before it a carrier that may not have intervened, if it seems to be in the public interest.

Senator FESS. He objected to that.

Mr. CAIN. He objetced to that. I think that is absolutely necessary for the protection of the public interest.

Senator FESS. His position was that if it were a good thing the railroad itself it would intervene. I doubt that very much myself.

Mr. CAIN. They do not intervene.

The CHAIRMAN. That is the best answer. They do not do it.

Mr. CAIN. Take the Great Northern Pacific Consolidation case now pending. Out of a large number of short and weak carriers, I do not believe there are more than half a dozen that intervened in that proceeding. They do not know what it is all about. They do not know what is going to happen, or whether anything is going to happen. Therefore the public interest may be seriously affected unless the commission is required or authorized—of course, impliedly required—to do what is provided for here.

In that very connection, I think that the commission could not fully protect the public interest unless you include paragraph 2 of section 207, which applies particularly to the short and weak carriers. Commissioner Hall suggested that part of that might be deleted, but I do not see how you could afford to delete any part of that unless you leave the commission merely to guess whether or not it should bring in, on its own motion, some carrier that did not intervene.

I appreciate the fact that the commission does not want to take any more of the burdens of consolidation upon itself than is absolutely necessary, and I think that this paragraph can be written so that if the commission is thoroughly cognizant of the facts, it need not make any study; and I now propose an amendment which I submit to you gentlemen, which reads as follows. I will read from line 2 on page 12 of the bill:

> * * * the comm'ssion is directed to make and have available for its use, a study of the short and weak carriers, but without postponing for the purpose of any general study the consideration of and action upon any plan proposed under this title.

The CHAIRMAN. Commissioner Hall proposed an amendment to that.

Senator FESS. He suggested that part of it be deleted.

Mr. CAIN. Yes.

The CHAIRMAN. I remember the clause.

Mr. CAIN. Of course, the idea Commissioner Hall had was that would slow up a consolidation case unnecessarily, if they had to stop and make a study. He suggested that we were here to protect the short line railroads, and that the commisson has been making a study of the short and weak railroads for a number of years. That may be true, and if true, if they know all the facts of a particular case, and know the situation in a particular territory, it would

be amply protected by the suggestion I make here which would change the paragraph to read as follows:

> The commission is directed to make and have available for its use, a study of the short and weak carriers, but without postponing the consideration of and action upon any plan proposed under this title, except for such study of the short and weak carriers in the territory involved in the plan as the commission may deem needful or desirable.

That leaves the commission to determine whether it has sufficient knowledge of the facts in a particular territory.

The CHAIRMAN. They naturally would do that anyhow. They would have to study it all any how. I do not think you can confer authority on them to study especially a proposition of that kind, because they would have to do that any how.

Mr. CAIN. You might say that they would do that with respect to this whole clause under this paragraph 2. But I have found in my experience, especially with agencies like the commission, that if they have the authority and do not exercise it, it does not do any harm to tell them about it again. In other words, you may say "Here is your duty. Go and do it."

I do not know of any agency of the Government where that is, perhaps, more desirable than in the commission, for this reason, that it is an overworked body.

The CHAIRMAN. That is true.

Mr. CAIN. They can not take the time, and they have no opportunity to find out just how far they ought to go.

There is one other feature of this bill to which Senator Couzens called attention. While it is not a matter of so much importance to us, I think I can make a suggestion that will meet Senator Couzens's view, and at the same time would not be harmful to the machinery under the plan which the trunk lines and we desire to have incorporated in the bill.

The CHAIRMAN. Read it, please.

Mr. CAIN. It is paragraph 2 on page 25:

> The petitioning carriers, at any time before the effective date of the order of the commission approving the plan, may withdraw and abandon their petition proposing a plan as to which there is a dissenting stockholder.

I think Senator Couzens has very pertinently suggested that that might furnish a field for manipulation and raising or lowering the stocks in an improper way. I suggest this:

> The petitioning carriers, at any time before the effective date of the order of the commission approving the plan, may, with the approval of the commission for good cause shown, withdraw and abandon their petition,

And so forth. That would give the commission not only the power, but the duty to pass upon the question as to whether it would be proper to withdraw it.

Senator COUZENS. I think that would go a long way toward correcting the evil that I know now exists. It does really exist, as a matter of fact.

Mr. CAIN. I have some knowledge of it myself.

Senator COUZENS. It is not conjecture at all. It is a fact.

The CHAIRMAN. I think you are right about that.

Senator SACKETT. Why not leave that "withdraw with the permission of the commission"?

Senator COUZENS. Certainly that language does not hurt it any.

Mr. CAIN. It would have the same effect, of course.

Senator COUZENS. I think there ought to be a showing to the public as to why they withdraw.

Mr. CAIN. Mr. Chairman and gentlemen, I am not going to take any more of your time. Permit me to say in conclusion that I doubt if you have any legislation before you of greater importance than the passage of some remedy that may better the situation of the short and weak railroads. The only possible remedy that has been suggested in recent years is incorporated in this bill. These consolidations or purported consolidations are going on, and unfortunately the commission is at sea, the carriers are at sea, and everybody is at sea. Nothing is being accomplished.

Senator SACKETT. Do you think you have enough in the bill to overcome any disposition of stockholders of short-line railroads to hold up consolidations?

Mr. CAIN. The same situation obtains as to them as with respect to the trunk lines. Their interests may be condemned.

Senator SACKETT. Minority interests may be condemned, but not majority interests.

Mr. CAIN. I do not think it is limited. Is it limited, Mr. Thom? I do not remember.

Mr. THOM. Only a minority interest may be condemned.

Senator COUZENS. A majority interest may be dissenting. Does it cover a majority or minority, or any dissenting interest?

Mr. THOM. It defines who are dissenting stockholders, and that they do not constitute the majority in any company.

Senator SACKETT. The point I wanted to make, Mr. Cain, was this: Suppose there is a consolidation in which the Interstate Commerce Commission thinks it is important that one of your short lines be taken in, and that short line can not get what its majority thinks it ought to get, although it is a financially impoverished line. Is there anything in the bill that would enable the Interstate Commerce Commission to take them in?

The CHAIRMAN. Not in this bill.

Mr. CAIN. Not in this bill.

Senator SACKETT. Do you think there ought to be anything at all in the bill? I understand now that if 40 per cent of the stockholders of a short-line railroad become dissenters, you can condemn their interest and take them in. But suppose 52 per cent become dissenters. They can not do it.

Mr. CAIN. Then they ought to be taken in the public interest.

Senator SACKETT. If the great public interest required them to be taken in, the 52 per cent could block the whole public interest in that regard. Do you think it ought to be changed in that regard at all?

Mr. CAIN. Senator, I do not believe that is necessary at all. I do not think that that question, in practice, will ever arise.

Senator SACKETT. Why should it not arise with the 52 per cent just as regularly as with the 40 per cent? That is the point I have been driving at.

Mr. CAIN. For the simple reason that all these short and weak railroads are in such peril; they are at such a disadvantage, as I tried to point out in the beginning of my remarks, when they have

to meet the competition of the automobile and the trunk-line systems, that nobody but a fool would fail to take advantage of the opportunity to sell the property at a price that the commission would fix, and if left out because of refusal to accept the price fixed by the commission they are not so important as to substantially affect the public interest.

Senator SACKETT. The bill contemplates that 40 per cent of the stockholders of that weak line might be such fools that they would not take the price that the commission fixed, and then it provides for going into a condemnation proceeding. But suppose, instead of 40 per cent being fools, we have a weak line with 52 per cent that are fools. Then you give them a very particular nuisance value by which they can hold up a consolidation, because there is no power on earth that can bring them in under the law.

Mr. CAIN. Still, if you have a nuisance value, you have an opportunity to deal with the trunk line. In other words, that nuisance value carries with it the idea that the property is a disturbing element in the operations of the trunk line.

Senator SACKETT. No. It carries with it the idea that it is in the public interest that it should be taken in. It seems to me you put your 52 per cent in a very powerful position to hold up a consolidation, unless they get the price they want.

Senator FESS. Senator Sackett, if you can do it with respect to the 52 per cent, then you immediately enter upon compulsory consolidations.

Senator SACKETT. So far as the weak and short lines are concerned, I do not see how you are going to get away from it. If you are going to take by condemnation the rights of any minority, that is compulsory. If I am a minority, I am compelled just the same as if I am a majority. You relieve the general railway consolidation from being held up by a nuisance value of 40 per cent of weak-line stockholders, but you put a strong nuisance value upon 52 per cent or more of weak-line stockholders if it is essential in the public interest.

Senator FESS. The theory of the bill, however, is to avoid compulsory consolidations.

Senator SACKETT. You do not avoid it on the 40 per cent.

Senator FESS. That is applicable where a majority of the stockholders want it.

Mr. CAIN. I have this further suggestion to make, if you will allow me, Senator. I think it would perhaps jeopardize the passage of a law if you incorporated in it compulsory consolidation—in other words, that much of compulsory consolidation. If the trunk-line railroad could not acquire the short line or weak line, but condemnation proceedings might have to be instituted, it would be hazardous for the trunk line itself as well as the weak line to be compelled to take the property at the price that a condemnation commission might fix. I think both class of carriers would perhaps object to being compelled to deal on that kind of a basis. I think there is some danger of defeat of legislation on that basis. I think the importance of it justifies our proceeding as far as we can go. As I say, it is not all we want, but we feel that this problem is so intricate that we have to approach it and deal with it step by step, as it were.

Senator SACKETT. I think that is the weakness of your position. It is compulsory consolidation so far as the dissenting stockholders go.

The CHAIRMAN. Yes.

Senator SACKETT. The dissenting stockholders are limited by the law to less than a majority. If you are going to have compulsory consolidation for less than a majority, and the whole thing is in the public interest, I do not see how you are going to get away from compulsory consolidation on more than the majority if it is in the public interest.

The CHAIRMAN. Compulsory consolidation made necessary by reason of the financial stress of the short lines.

Senator SACKETT. If you put them in a nuisance-value position, the financial stress becomes a financial asset.

Mr. ROBINSON. As president of the short line association, may I supplement Mr. Cain's statement in answer to Senator Sackett? The nuisance value ceases to be of importance when the commission has the power to say, "Well, we will let this consolidation go through and leave you out."

Senator SACKETT. It does unless the public interest is so great in that particular that it continues its nuisance value.

Mr. ROBINSON. That would have its bearing on the problem, but the important thing, as I see it from my experience, is that the commission is in a position to say, "Well, we will just leave you out, and leave you where you are." Then, some people who think they have a nuisance value find they have not got so much, and they promptly trade.

Senator SACKETT. That is true; but I can readily conceive that a road might be thrown in either one of these situations.

Mr. ROBINSON. I feel that there is that possibility.

Senator SACKETT. I feel that that is the weakness of your position.

Mr. CAIN. I was just about to close. I was trying to point out the importance of some action at this session of Congress in regard to a consolidation bill. I have mentioned a number of these consolidation cases that are pending. Thus far we are all up in the air. We do not know how we ought to proceed. As far as we are going, it is under the provisions of paragraph 2 of section 5, which has but one finger board to guide us—and that is the public interest. Carriers come in and present a plan and set up what they consider to be in the public interest. Thus far the commission has dismissed these cases without, in my opinion, considering them in a constructive way, as they might do, because the commission is very careful and very meticulous with regard to whether or not the law clearly authorizes them to do a certain thing.

Senator SMITH. Is it your opinion that the policy of consolidation is to the best interests of the public?

Mr. CAIN. Undoubtedly it is.

Senator SMITH. Whether the Esch-Cummins law was in existence or not?

Mr. CAIN. Yes, sir. I am positive, so far as my opinion can be positive, that it is in the public interest that we should have a merger or unification of these carriers. There are many reasons for it that have been set out over and over again.

In that connection I merely ask the privilege of inserting in the record here a portion of the report of this committee made on the 5th of April, 1926, on Senate bill S. 3884. I would like to insert, Mr. Chairman, that part of it beginning on page 3 where I have marked, and continuing down to the end of the portion marked on page 4.

The CHAIRMAN. That may be done.

(The matter referred to is as follows:)

The net railway operating income of all the railways in the United States was, in 1922, $769,411,093; in 1923, $974,017,715; in 1924, $987,123,417 (for 1925 the reports are not yet complete). If all the railway properties were owned by a single corporation, this net railway operating income for 1924 would have paid more than 5 per cent upon the value of these properties, as tentatively determined by the Interstate Commerce Commission in 1920, with the capital investments since that time added. This, it is believed, would closely approach a fair return.

When, however, we inquire with respect to the distribution of this aggregate net operating income, we come to the real question involved in the policy of consolidation. The evidence submitted to the committee shows beyond controversy that no considerable part of our railway mileage can be abandoned. On the other hand, it is not controverted that our railway companies will be compelled for many years to come to invest from $750,000,000 to $1,000,000,000 annually of new money, that is to say, funds not derived from operation, in order to enlarge and improve their properties to meet the constantly growing demands of commerce. There are but two methods that can be employed to secure this new money. One is to borrow it, the other is to issue and sell capital stock for it. To borrow it the company must have good credit and be able to convince the investor in its bonds that it can carry the interest, and at the maturity of the loan, pay the principal. To sell stock at anything like par the company must be able to show that from its operating revenues it can pay the cost of operation and maintenance, its fixed charges, and a fair dividend upon its capital stock.

Bearing these things in mind, we are ready to inquire how the aggregate net railway operating incomes of 1922, 1923, and 1924 were distributed. It would prolong this report unduly to set forth the net railway operating income of each of the railway companies performing the service of transportation. For these details, reference must be made to the hearings. The following facts will be sufficient upon which to rest a conclusion:

First, it may be said that the 22,000 miles of Class II and Class III roads, as a whole, barely earned operating expenses although there was moved a greater tonnage in each of these years than ever before. Specific illustrations of the situation will be confined to Class I roads which carry about 96 per cent of our entire traffic.

Seventy railway companies of Class I, operating over 54,000 miles for the years 1922, 1923, and 1924 had an average net railway operating income of less than 3 per cent upon their property investment accounts. We use the property investment account because the Interstate Commerce Commission has not yet finished its valuation of all these properties. Twenty-one of these companies did not earn the cost of operation and maintenance. It is obvious that a railway company which earns less than the expense of operation and maintenance must verp quickly cease operation, and it is equally obvious that a railway company which does not earn 3 per cent upon its value can not furnish adequate and efficient transportation for those who rely upon it for that service. A table, showing the names, mileage, yearly net operating incomes for the three years mentioned, is attached to this report. Thirty additional railways of Class I earned, during these years, an average net railway operating income of less than 4 per cent.

Without taking into account, at the present moment, the economies that may be secured through consolidation, it is submitted as an inevitable conclusion, that if a process of wise consolidation is not soon entered upon and rapidly carried forward, not less than 60,000 miles, and it may reach 80,000 miles, of our rail transportation system must be either abandoned or, at the best, will be rendering the most unsatisfactory and inefficient service.

These facts present the chief, though not the only, reason for the passage of this bill. Argument upon these conditions seems to be unnecessary. If

the facts are fairly understood, consolidation, in some form, is a foregone conclusion.

While the continued and successful operation of all our railway lines is the principal reason for consolidation, it will be borne in mind that many students of the subject believe that great economies, both in operation and in maintenance, would be attained through intelligent and supervised consolidation. Unnecessary train service could be avoided, great overhead expenses could be eliminated; repairs upon equipment could be immensely reduced and haulage of empty cars could be largely overcome. It has been estimated that, with the service now being rendered, there could be a saving of from $300,000,000 to $500,000,000 annually, all of which could be utilized in a reduction of freight and passenger rates.

It is hoped that this showing, drawn from the evidence submitted to the committee, will leave no doubt in any mind respecting the desirability of pursuing the policy of reasonable unification under the supervision of the Interstate Commerce Commission and always with an eye single to the public interest. The committee has not had in mind increasing profits for the railway companies. Its attention has been directed solely to the highest efficiency in service and the lowest rates at which that service can be performed.

Mr. CAIN. I would like, if I may, to also put in a letter I received yesterday from Mr. C. F. Propst, president of the Chicago, Attica & Southern Railroad, setting out a situation——

The CHAIRMAN. I am perfectly familiar withat that situation.

Mr. CAIN. I thought you were. I merely want to introduce it as a part of my testimony.

The CHAIRMAN. That will be satisfactory.

(The letter referred to is as follows:)

WASHINGTON, D. C., *March 1, 1928.*

Mr. BEN. B. CAIN,
Vice President and General Counsel,
American Short Line Railroad Association,
Washington, D. C.

DEAR MR. CAIN: By way of confirming what I told you to-day in my conservation, would say that I have telegrams here to-day from my office in Attica, Ind., that the Grand Trunk Railway insist that they must cancel, because the Big Four (C. C. C. & St. L.) demands it, their division sheet in connection with the through routes to which we are now a party between their stations on the one end, and Cairo and East St. Louis on the other end, where the Cleveland, Chicago, Cincinnati & St. Louis Railway is also a participant carrier from those last-named gateways up to our line at Veedersburg, Ind.

The Grand Trunk have not indicated any desire on their own part to withdraw these percentages, nor has the Big Four expressed any dissatisfaction with the divisions, and all we have been able to get out of them is the meager statement that "subsequent developments indicate these percentages are no longer necessary."

The only "subsequent developments" of which we have any knowledge is the fact that in the recent hearing on the application of the New York Central for authority to complete its control of the operation of the Big Four (C. C. C. & St. L.) by means of a lease, they opposed taking over any short lines, and sought to make it appear that the use of our line, the Chicago, Attica & Southern, in connection with the Big Four and the New York Central was unnecessary. Thereupon, our traffic manager, Mr. Dolch, testified that the Big Four had besought our line to open up this very route and establish percentages, and, of course, that was very good evidence that they considered the route feasible and desirable, and indeed it is the shortest route to representative points like Battle Creek and Grand Rapids.

Although it is a feasible and desirable route, and is shorter, and the divisions are satisfactory, the Big Four is compelling the Grand Trunk to cancel the divisions with no other excuse than that they are no longer necessary. The only inference we are able to draw is that they are either retaliating against us for our temerity in having intervened in their merge case, or that they are embarrassed by the fact that their actual use of the route in connection with our line does not "square" with their contention in the merger case that the use of our line in connection with theirs is unnecessary and superfluous. It happens that the traffic can move out of St. Louis and Cairo by another line than the Big Four, but yet they are willing to take the risk of "cutting off their nose to spite their face."

I might add for your ready reference that our railroad is 120 miles in length, and runs south from LaCrosse to West Melcher, all in Western Indiana parallel to the western boundary of our State. It traverses eight counties in the western part of Indiana, and of the 48 towns and villages along this line 32 of them are served solely by this railroad.

Our railroad is the revived portion of the Chicago & Indiana Coal Railway of the Chicago & Eastern Illinois, which the latter attempted to put out of business, and which was attempted to be abandoned in May, 1922. The public was seriously distressed and embarrassed by the suspension of the railroad, and because of their need for a railroad the present Chicago, Attica & Southern was organized. Four townships voted assistance in the aggregate sum of $149,000 shortly after the organization of the road, and in addition, firms and individuals served by it contributed $92,700 to its reorganization and rehabilitation.

The Interstate Commerce Commission held that our line was a public necessity and convenience, and we have been conducting a hard uphill fight to preserve it to serve the public, with the confident expectation that its necessity has been so demonstrated that it will eventually be attached to some strong system pursuant to the intention of Congress that these weaker roads should be sustained by ebing attached to and made a part of larger and stronger carriers able to operate them for the public in the most adequate and efficient way.

Although we understood that section 5 of the act contemplated that the Interstate Commerce Commission would adopt a plan for the consolidation of all carriers so we would know to what particular road we would eventually be allocated, the commission has failed to adopt any plan. This absence of a plan has, therefore, forced us to incur the expense and trouble of intervening when any of our connections are involved so as to be sure the commission would not lose an opportunity to attach us to one or the other of the large systems with which we connect.

We intervened when the Baltimore & Ohio asked for authority to merge the Cincinnati, Indianapolis & Western under a lease. That was a case where the strong road was taking on one very weak property anyhow, and the commission seemed to feel that it was enough for them to take over the Cincinnati, Indianapolis & Western "cripple" without requiring them to take us on too. We do not quarrel with that, however, as our line might well be attached to some other strong line other than the Baltimore & Ohio.

Incidentally, I want to say that this taking order of the Cincinnati, Indianapolis & Western by the Baltimore & Ohio is a fine example of the good which can come from consolidation of a weak road with a strong one. It was a "hard-up" property, operating at a heavy deficit and in no position to borrow money to improve its condition. When the Baltimore & Ohio became its owner, however, they promptly proceeded to spend large sums of money to rehabilitate and improve the Cincinnati, Indianapolis & Western, so it could operate less expensively and put on through train service, with the result that they have enormously benefited the public served by the Cincinnati, Indianapolis & Western. The Baltimore & Ohio is a rich, prosperous road, and I suppose it will owe the Government considerable recapture money anyhow, so it was good business on their part to buy the Cincinnati, Indianapolis & Western for a fraction of its rate-making value, as they can add the full amount of that value to the rate basis value of the Baltimore & Ohio itself.

However, there is a black side to the picture too, for under Baltimore & Ohio ownership and control the Cincinnati, Indianapolis & Western has done some bad things to us, and I want to tell you of two of the most flagrant instances. Most of the coal we use on our line, including the coal for our locomotives, comes from mines on the Chicago & Eastern Illinois in Indiana, and the Cincinnati, Indianapolis & Western gets a short haul on it of about 3 miles between the Chicago & Eastern Illinois at Hillsdale and our line at West Melcher. The rate on that coal used to be $1.20 a ton, but the Indiana commission ordered it cut to only 80 cents, which is way too low and is now being fought out.

In the meantime, however, the Cincinnati, Indianapolis & Western took the position that it was going to keep the same 20 cents per ton cut of the 80-cent rate as they formerly got out of the $1.20 rate, and that the Chicago & Eastern

Illinois and ourselves would have to stand all the reduction. We wouldn't agree to this and we complained to the Indiana commission. That commission turned us down on the ground that it was obvious that an 80-cent rate to be divided between the three lines wasn't enough to give either of them a fair division, and therefore merely dismissed our complaint. The humor of that situation is apparent when you remember that they made that low rate themselves. This left it to the Chicago & Eastern Illinois, the Cincinnati, Indianapolis & Western, and ourselves to fight it out as best we could.

For awhile we held the whip hand because the coal was billed collect, and when we got the freight charges from the consignee we would send the other lines what we felt was fair, and that was to divide the 80-cent rate in the same proportion as the former $1.20 rate.

There is a tariff agent who publishes and files with the Interstate Commerce Commission as a tariff a list of the collect and prepay stations for each line which is a party to it. We were a party to it, and the Cincinnati, Indianapolis & Western used its greater influence to induce the tariff agent to put a special note in our list, without our consent and over our protest, to the effect that this coal must be prepaid. That took the whip out of our hand and gave them the strong arm power to hold out the full 20 cents they demanded. We even had to send the money to the mines to prepay our own fuel coal. It was only after we appealed to the American Short Line Railroad Association and they handled it very vigorously with the tariff agent, that this note in our list was taken out and the coal is now moving collect, so we are back in a better position, but the row isn't settled yet.

Another instance was where there was to be a lot of highway work in a section served by our line for which sand and gravel was needed. We had a good sand and gravel pit on our line and expected to get all this business. However, we had trusted the Cincinnati, Indianapolis & Western with a power of attorney to publish one joint tariff carrying joint rates between our stations and their stations. Under that tariff they published such low rates on sand and gravel from a pit on their line that it took the traffic away from the pit on our line, and in spite of our strong protests they kept that rate in until the traffic had practically all moved, and we have been in a controversy with them ever since over the division of that rate as they are trying to make us stand a proportionate part of that low rate which enabled their pit to cut our throat.

The President of the Baltimore and Ohio, Mr. Daniel Willard, is regarded as one of the best in the business. I so regard him, but even under his management this is what his people have done to a "cripple" like the Chicago, Attica & Southern.

We also intervened in the application of the Chesapeake & Ohio to acquire control of the Erie and Pere Marquette. That case has not been decided.

We connect with both the Big Four and the New York Central, and much is to be said for including our line in that particular combination. In actual practice they have used our line as a participant in through routes, but it is evident that they are now trying to minimize all they can the importance of our participating with them in through routes and rates.

The situation of our road illustrates clearly, to my way of thinking at least, that (1) the commission should be required to carry out the present mandate of Section 5 to prepare a plan, though it need not be anything more than to determine the tentative allocation of each line to each other, subject to further revision whenever necessary so as to provide enough elasticity for change; and (2) that the larger carriers are narrowly seeking their own selfish ends on a very limited conception of their duty, and to escape any duty are willing to go out of their way (and jeopardize their own traffic interests) to try and discredit the usefulness to them of a short line which the Interstate Commerce Commission has found to be a public convenience and necessity, and upon which a large section of the rural communities depend.

I understand that there is a strong effort being made to cut out of the new consolidation act the declaration of policy. I think that this would be the greatest mistake it would be possible to make, because after all that was said in Congress when the law was enacted, and has been said by the commission since the big, strong roads have persistently refused to take a statesmanlike view of the whole situation as to the necessity for preserving the short and weak lines, and if there is omitted from the present act the very definite declaration that one of the objects or the principle object of permitting consolidation is to have the weaker lines merged with the stronger, in order to preserve a definite and efficient system of national transportation, the big roads will be encouraged to persist in their natter attitude and claim that their position is now confirmed by Congress in refusing to lay down any declaration of policy.

In conclusion I want to revert to the present effort of the Big Four (C. C. C. & St. L.) to compel the Grand Trunk to cancel divisions via our line, and say that our experience with the traffic officials of the New York Central and the Big Four has heretofore been unusually satisfactory. We have found them to be not only high-class gentlemen, but considerate, liberal, and broad in their viewpoints, hence we are confident that this attempt to cancel our divisions does not originate with them, but represents a policy which has been handed down to them from above as the result of our having intervened in the proposed merger of the Big Four with the New York Central.

It is in that respect, therefore, that I give you these facts as a significant sidelight on what experience indicates may be expected from the large roads, at least until they are more deeply impressed by considerations of public policy in the preservation of weak lines like ours.

This for your information.

Very truly yours,

C. F. PROPST,
President Chicago, Attica & Southern Railroad, Attica, Ind.

Senator SMITH. Before you leave that I want to ask you one question. Do you think the situation as to the short lines could be benefited or relieved if the idea involved in the recapture clause were made feasible and workable? Do you think that you would still insist on consolidation in the public interest if the excess earnings of the fortunate roads could be so obtained by the less fortunate roads, in a manner that was not as the law now provides, which you say is almost unattainable? If it could be easily attainable——

The CHAIRMAN. Of course, that is based upon the valuations, and the valuations have not been concluded. Nobody knows when they will conclude the valuations.

Senator SMITH. I said upon the idea involved. Of course, your valuation will be the basis. In other words, do you think, if the legislation were such that that recapture fund were available for your use in the manner that the law was supposed to contemplate, that it would relieve your situation?

Mr. CAIN. No. It would help, Senator, but it would not cure the situation, because, while it would provide some funds, we would necessarily have to pay that debt in some sort of fashion. If you went back to the idea that Senator Cummins had, of taking the excess, 100 per cent instead of 50 per cent, and distributing it to the carriers that earned less than a fair return in a particular group, that would, of course, immediately inspire or induce the trunk-line railroads that had to give that up to take over the short lines.

Senator SMITH. Precisely; and that was the idea contemplated in the original act. I was a member of the committee, and the idea was that we were to take all the railroad property dedicated to public use and estimate its value, and upon that fix such rates and charges as would produce a fair return upon the property investment; and than to so distribute the earnings in excess of a certain amount accruing from a certain group to those that did not earn a fair return, that the public, which paid the tax, would get the benefit thereof, just like a school fund. Whether I went to school or not, I would get the benefit of the tax. But we put in certain inhibitions and provisos that rendered the whole idea abortive.

Mr. CAIN. We were in hearty accord with that, as you know. It is not in this bill. As I have already said, we would be glad to get half a loaf if we can not get a whole loaf. We are anxious to get as much relief as possible, and I can not too strongly impress upon you our desire to have this law passed, if we can not get any more.

Mr. L. S. Cass, of Waterloo, Iowa, vice president of the American Short Line Railroad Association, wanted to appear before the committee. He is unable to be here, but he has prepared a statement. I would like to have the privilege of inserting it in the record.

The CHAIRMAN. Very well.

(The statement referred to is as follows:)

STATEMENT OF L. S. CASS, VICE PRESIDENT AMERICAN SHORT LINE RAILROAD ASSOCIATION

Mr. Chairman and gentlemen, my name is L. S. Cass. My home is at Waterloo, Iowa. I am vice president of the American Short Line Railroad Association with offices in the International Building, 1319 F Street, Washington, D. C. My railroad experience dates from 1884 to the present time, 43 years. I have served as telegraph operator, station agent, brakeman, conductor, train master, superintendent, assistant general manager, general traffic manager, and vice president of the Chicago Great Western, a trunk line; also, I have built one short line that cost $10,000,000, and was its president for 26 years. I have also been president and receiver of a short line which had 171 miles of main line. The line I financed and built is the Waterloo, Cedar Falls & Northern, located in Iowa. The line I was receiver of and president of the corporation was the Kansas City, Wyandotte & Northwestern, built 40 years ago, and since September, 1918, I have been and am now an active vice president of the American Short Line Railroad Association, which consists of about 475 short and weak lines located in 47 States of the United States and Hawaiian Islands—I say about 475 roads, because the membership varies from time to time by a few lines.

The mileage operated by short lines, members of our association, is approximately 30,000 miles, with a property investment of approximately $2,000,000,000. Substantially all of these lines came into existence because of a public necessity, and in most cases that public necessity has intensified since the lines were built. Of course, there are instances where the necessity for some lines has ceased to exist, such as a line built to serve a coal deposit that has been exhausted or a manufacturing plant that has been discontinued because of the raw material being entirely consumed, but on most all short or weak lines the development of markets has been established through private enterprise. The butcher, the baker, and the candlestick maker have gone along these lines and invested his all to build up a business and make a home for his family and dependents; the farmer has gone out along these lines and subdued the soil, depending upon the grain, livestock, and cotton markets, established at the railroad station, being permanent. So that, if we are to avert a calamity to the communities that are served by these short or weak railroads, the way must be found to preserve these carriers and not alone preserve them in their present ability to function, but means must be provided so they may grow in strength as the necessities of the growing business demands, and this can not be done if their strong trunk-line connections are permitted to consolidate without giving due consideration to the preservation of the weak or short lines. Under such consolidation the weak must perish and with them go the fortunes of the population served by them, as well as a material amount of national wealth. In a series of articles written by the late Senator A. B. Cummins, coauthor of the transportation act of 1920, and printed in the Waterloo (Iowa) Tribune, the Senator said—now, I have copies of those articles here, if any of the members of the committee would like to have them.

I am now reading, on page 6 of this pamphlet, the article entitled "Hundreds of companies":

"There is little difficulty in dealing with such roads as the Pennsylvania, the New York Central, the Baltimore & Ohio, the Erie, or the Chesapeake & Ohio, in the East; the Louisville & Nashville, or the Southern, in the South; or the Chicago & Northwestern, the Chicago, Burlington & Quincy, the Southern Pacific, the Union Pacific, the Chicago, Rock Island & Pacific, the Atchison, Topeka & Santa Fe, the Northern Pacific, or the Great Northern, in the West. To those I have named may be added many other comparable roads. These properties will be able under any probable legislation to maintain themselves, but what will we do with such roads (and I will take them in their alphabetical order) as the Atlanta, Birmingham & Atlantic, with its 640 miles of main track, that in 1922 failed to earn operating expenses by nearly one-half of a million dollars; the Atlantic City Railroad, with its 177 miles, operating at a net loss of nearly $200,000; the Buffalo, Rochester & Pittsburgh, with its 590 miles, earning less than $1,000 per mile; the Central of Vermont, with its 532 miles, earning less than $800 per mile; the Chicago & Alton, with 1,050 miles, earning about $1,500 per mile; the Chicago & Erie, with its 270 miles, suffering a net loss of $1,500,000; the Chicago Great Western, with its 1,500 miles and a net income of only $265,000; the Chicago, Milwaukee & St. Paul, with its 11,000 miles and a net income of a little more than $1,000 per mile; the Chicago, Peoria & St. Louis, with its 247 miles and a net loss of $450,000; the Cincinnati, Indianapolis & Western, with its 347 miles and a net income of $60,000; the Colorado & Southern, with its 1,100 miles and a net income of $1,000 per mile; the Denver & Salt Lake, with its 255 miles and a net loss of $150,000; the Detroit & Mackinac, with 385 miles and a net income of $57,000; the Detroit, Toledo & Ironton (Ford's road), with its 455 miles and a net loss in operation of $159,000; the Duluth, South Shore & Atlantic, with its 591 miles and a net income of $87,000; the Fort Smith & Western, with its 250 miles, earning about $600 per mile; the Fort Worth & Rio Grande, with 235 miles and a net loss of $250,000; the Georgia & Florida, with its 405 miles and a net income of $100,000; the Georgia Southern & Florida, with its 402 miles and a net income of $395,000; the Green Bay & Western, with its 258 miles and a net income of $160,000; the Kansas, Mexico & Orient, with its 748 miles, failing to earn operating expenses by $475,000; the Los Angeles & Salt Lake, with its 1,140 miles, earning a trifle over $1,000 per mile; the Louisiana Railway & Navigation Co., with its 343 miles and a net income of $88,000. The Minneapolis & St. Louis, with 1,650 miles and a net income of $83,800; the Mississippi Central, with its 259 miles and net income of about $800 per mile; the Missouri, Kansas & Texas, with its 1,738 miles and a net income of less than $750 per mile; the Missouri Pacific, with its 7,261 miles and a net income of a trifle more than $1,000 per mile; Morgan's Louisiana & Texas Railway & Steamship Co., with its 400 miles and an income of $13,000; the New York, Ontario & Western, with its 569 miles and an income of substantially less than $1,000 per mile; the New York, Susquehanna & Western, with its 135 miles and a net loss of $301,000; the Oregon-Washington Railroad & Navigation Co., with its 2,231 miles and a net loss of more than $1,000,000; the Panhandle & Santa Fe, with its 857 miles and a net income of $250 per mile; the Quincy, Omaha & Kansas City, with its 252 miles and a net loss of $168,000; the St. Joseph & Grand Island, with its 258 miles, earning about $300 per mile; the St. Louis, Southwestern of Texas, with its 870 miles and a net loss of $1,200,000; the San Antonio & Arkansas Pass, with its 739 miles, earning about $300 per mile; the San Antonio, Uvalde & Gulf, with its 317 miles and a net income of $700,000; the Tennessee Central, with its 292 miles and a net loss of $250,000; the Texas & New Orleans, with its 507 miles and a net loss of $90,000; the Toledo, Peoria & Western, with its 247 miles and a net loss of $212,500; the Trinity & Brazos Valley, with its 368 miles and a net loss of $13,800; the Ulster & Delaware, with its 128 miles and a net loss of $47,000; the Wheeling & Lake Erie, with its 511 miles, earning about $750 per mile; or the Wichita Falls & Northwestern, with its 329 miles and a net loss of $89,000."

"OTHERS IN SAME PREDICAMENT

"When I have used the words 'net loss' in the foregoing statement I have meant that the road referred to earned that much less than the cost of operation; and when I have used the words 'earning' and 'net income' I have meant the net railway operating income applicable to the payment of interest on bonds and other obligations or dividends upon capital stock. It must also be remembered that in each instance I have referred to 1922, the year of the largest traffic and the highest rates ever known. When I have mentioned a number of these roads I have not mentioned a great many others in the

same predicament simply because they are of less importance; nor have I mentioned any of the hundreds of roads having gross operating revenues of less than $1,000,000. Most of these roads have not been able properly to maintain themselves and none of them have been able to add facilities which the increasing commerce of the country requires. It can be safely said that unless these roads and many others like them can better their condition they will remain for an indefinite time incapable of rendering efficient service and scores of them must be completely abandoned."

Now, I know much about the Minneapolis & St. Louis, 1,627.80 miles of line, located in the States of South Dakota, Minnesota, Iowa, and Illinois, because many years of my railroad activities were in the territory served by this line, and as late as November, 1927, I made a complete inspection of the property for one of the bondholders' committeemen. I have no financial interest in this property, nor am I now employed by its receiver or any of the securities committees or security owners. I am, however, a citizen of the United States and confess to 40 years' railroad experience, and view with deep apprehension any attempt on the part of any interests to consolidate the strong with the strong and omit the weak. I am likewise a resident of the State of Iowa and feel that the predicament of the Minneapolis & St. Louis Railroad, with 877.17 miles of its 1,627.80 miles of operated lines located within Iowa, is of grave concern to the residents of that State. It is of special financial importance to a large number of my neighbors and its abandonment would spell absolute bankruptcy to the butcher, the baker, and the candlestick maker located upon its line at stations served by no other railroad, of which there are 62 in Iowa and 133 on the system. This line went into receivership July 27, 1923.

Now, let us look at the results from the operation of the Minneapolis & St. Louis Railroad as an independent property. In 1926, 48.64 per cent of its traffic was produced on the farms and 27.14 per cent of its traffic was supplies such as are bought by rural communities, so that 75.78 per cent of its freight traffic is of direct interest to the daily life of the farmer and rural communities. To this 75.78 per cent should be added the coal consumed by rural communities, for which I do not have the actual figures, but the total products of the mines handled was 16.78 per cent of its income, and I believe that it is conservative to say that 8.22 per cent of this traffic went to rural communities, in which event then 84 per cent of the traffic on this road is local to and from the rural districts and this is borne out from the further fact that the average distance all freight was carried was but 189.77, so that it will be seen here is 1,627.80 miles of railroad obliged to exist principally upon local business, serving farming communities notwithstanding that it is a through line connecting with the eastern lines at the Peoria gateway, avoiding the congested Chicago district; thence direct to the twin cities, Minneapolis and St. Paul, 490 miles; then directly west through Minnesota into South Dakota, a distance of 348 miles and yet with this straightaway mileage of 838 miles they enjoy but an average road haul of 189.77 miles, and be it remembered that the distance from Chicago to the Twin Cities via Chicago Northwestern, 421 miles; Chicago, Burlington & Quincy, 441 miles; Chicago Great Western, 435 miles; Chicago, Milwaukee & St. Paul, 421 miles; Soo Line, 459 miles; Rock Island, 536; and 490 miles via Minneapolis and St. Louis, Peoria to Twin Cities and carload business for the Northwest can move through Peoria in two days shorter time because of escaping the congestion of the Chicago district, and if consolidated with the lines running west from the Twin Cities a heavy through tonnage would flow over it.

This line represents the most striking example of the value of consolidation, viz, the preservation of transportation to the public, and as shown above here is a weak line all ready to take on a heavy through traffic between the eastern and northwestern lines, and if consolidated into the strong lines, it will be used for such through traffic and become strong and efficient, but if the strong lines are permitted to consolidate, leaving out the weak lines and they meet destruction, then the strong lines and the public will have to spend large sums of new money to provide facilities to accommodate the present as well as additional business that the investment already made in weak lines does now and would care for, and the weak lines will perish, with all its serious consequences to the investor and the public. The consolidation of the strong, which surely aids in the destruction of the weak, is truly not in the interest of conservation of our national resources.

Now, here is the situation with regard to that property:

If the Minneapolis & St. Louis bondholders should exercise their right of proprietorship, then this railroad, in place of being one road with a mileage of 1,627.80 will become six short-line roads; in other words, it will be consolidation in reverse, and may and probably would spell abandonment to a large part of this mileage, with all its serious consequences to the public.

The Chicago, Peoria & St. Louis Railroad, 247 miles long, spoken of in Mr. Cummins's article, a certificate of abandonment for that property was granted by the Interstate Commerce Commission. The people along the line, feeling keenly the loss of the property, or the possible loss of it, bearing in mind that it had been shut down, its operation had ceased, turned every possible resource at their command to put this property back in operation. They failed to do this as a road, as a whole, extending from Peoria, Ill., to St. Louis, Mo. The people got together and made two railroads out of two portions of this railroad, and the Chicago, Illinois & Midland bought a portion of it, making three portions of the line, consisting of about two-thirds in the three railroads.

The Chicago, Illinois & Midland is a prosperous railroad because it is a heavy coal-carrying road; and it took over a portion of the line from Springfield into Peoria. Then the people got together down there and they bought stock in two companies, and about the middle of 1926 one little piece of road 41 miles long was put into operation by the people along the line who bought the stock.

Another piece, extending from Springfield to Alton, Ill., 78 miles, was put into operation in December, 1926. I know a good deal about that road because I was honored by a position on the directorate on these two roads when they first started up in the endeavor to get them going, but my other affairs were of sufficient moment so that I could not act; but I was kept fully informed as to what was going on down there. I have just been invited by the heaviest creditor in that property to see if I can offer any solution to their problem. Now, here is what happened—and these are the figures furnished to me by the auditor of both of those little roads. Substantially the people at the head of these two little roads are the same people, but the people who bought the stock along the two lines are a different set of people; yet the people along the 119 miles of these two roads bought the very largest part of the stock that was put into rehabilitation of the property. Ahead of this stock the people who previously owned the property permitted their bonds to remain in certain amounts. On one property in the amount of $300,000, and in the other property in the amount of $500,000. So that the people on the two properties had $800,000 of first-mortgage bonds still resting upon the railroad in which they put in their money for the stock.

Let us look now at the results of the first year of the effort of the people to keep those two roads going. There was invested in this stock $317,800, and in the first year's operations, of the $317,800, $122,392.48 was wiped out in loss from operation. One or two years more and their stock would be entirely wiped out. The people made these investments to preserve their properties located along these little railroads.

Now, what would have happened if these two roads had been taken over by one of their strong trunk-line connections? I have worked out the figures here showing that the strong trunk connections could have operated these properties at a little profit, a small profit to themselves, without any substantial amount of out-of-pocket money in addition to what they are already paying in the operation of their present systems. Here they are:

On the Chicago, Springfield & St. Louis piece of the road, 78 miles of road, they paid in operating expenses $68,589.10 for hire of freight cars, locomotives, work cars, joint-facility rents that they rent from the trunk lines, etc.; and they paid out for overhead, superintendents, and general offices and traffic expense, which would not cost the trunk line any more to any extent, $49,455.51. Making a total outlay on that particular road—which would have been saved if the trunk line had been operating it—of $118,034.61. And their loss on that property was $95,340.23.

On the other shorter, smaller property they paid out for use of freight cars, locomotives, work cars, joint-facility rents, etc., $15,773.24, and they paid out for the overhead expenses that I spoke of $18,266.14, making a total on that property of $34,039.38. Their losses on that property was $27,052.27.

So there is a clean-cut situation that unless those properties are consolidated or unless something that none of us can see now should occur to increase the

revenues or decrease the expenses of those properties very materially their investment will soon be a total loss, there is a situation where the people would have been saved $122,000 without any material added expense to the trunk line that took them over and operated them.

I have before me the official stenographic minutes of a case that is now before the Interstate Commerce Commission, Docket No. 17801, "Rules for car hire settlement between railroads." This hearing was at Houston, Tex. It has not yet been finished, and is to be concluded here in Washington. I am just taking the pertinent parts of this testimony, which is taken under oath, to show you something of the difficulties of the farming communities located upon these railroads—these small railroads—and I am sure, from my many years' experience in railroad work, and the past 10 years associated with the American Short Line Railroad Association here in the troubles of all these little fellows, that this is reasonably illustrative of a great amount of mileage in this country. This is the testimony of Carl J. Turpin, under oath, before the Interstate Commerce Commission examiners—and I won't take time to wade through all of his testimony, because there is a great deal of it there that is not pertinent to your inquiry at all. I have just made notations of the parts which are pertinent to your inquiry. This is the testimony of Carl J. Turpin, Oklahoma City, Okla., vice president and general manager of the Beaver, Meade & Englewood Railroad Co., 47 miles of line, from Beaver to Hooper, Okla., and connecting with the Missouri, Kansas & Texas at Forgan, Okla., which is the northwest terminus of the Missouri, Kansas & Texas, Wichita Falls & Northern, western division. I know something about that situation because in 1917 I was employed by the bondholders' committee of the Wichita Falls & Northwestern Railroad to investigate that property. So I know about Forgan and the general condition of the country through which those railroads operate. Nevertheless, this particular railroad that I am now speaking of was not in existence at the time that I made the investigation, but the open country was there and one of the county seats was importuning the Katy to extend over there seven miles, and the people of that territory, because of the necessity for developing their country and have rail transportation, got together and built this railroad, and it is owned by the people in the territory and connects only with the Katy. Later on they hope to have a connection completed with the Rock Island, but their connection with the Rock Island may or may not change the condition of what the people have to do to keep this road in existence after the connection is made.

Outbound traffic on this railroad is principally grain; some livestock. Inbound is farm machinery, lumber, coal, oil, the usual things that are handled in rural communities inbound to supply the farmers and the people in those communities. In 1926 this road handled 2,000 cars, 1,500 outbound and 500 inbound. The arbitrary rates on that railroad over the junction-point rate are 5½ and 6 cents on wheat, and 5 and 5½ cents on corn. Now, 80 per cent of the wheat went to Galveston on a through rate all the way on the "Katy" Railroad at 38 cents per 100 pounds, while the grain from Forgan, to connecting point—Forgan is the point at which they connect with the "Katy"—while the grain from Forgan went on a 33-cent rate. Thus the farmers on this short line were obliged to pay $30 per car of 60,000 pounds more than the farmers close enough to Forgan to use that grain market. Or the farmer paid, in round numbers, a total of $45,000 per annum, which is equal to almost $1,000 per mile per annum in excess of the junction-point rate. That is quite a sum.

If this line was taken into the Missouri, Kansas & Texas system, my knowledge of rates and the structure of rates throughout the country leads me to believe that the junction-point rate would not be graduated beyond 2 cents at the extreme, 1½ and 1 intermediate.

As to the inbound tonnage, I do not have the total tons, therefore, I could not reduce the inbound tonnage to the question of actual cost to the farmer and to the rural communities out on this little railroad. Nevertheless, Mr. Turpin says that there is an arbitrary over the junction-point rate, etc., on inbound merchandise that people must buy.

The arbitraries over Forgan are: first class, 22½ cents per 100 pounds; second class, 18½ cents per 100 pounds; third class, 16 cents per 100 pounds; fourth class, 12 cents per 100 pounds; fifth class, 11 cents per 100 pounds; class A, 10 cents; class B, 10 cents; class C, 7 cents; class D, 6½ cents; class E, 6½ cents; bags, 13½ cents; brick, 5 cents; cement, 6½ cents; fencing material—and that is very interesting, of course, all through that country, because it is a new country being developed—12 cents; cereal foods, 13½ cents.

Some of the merchants have their merchandise shipped to Forgan and haul it from there, at the same time hauling eggs and produce on the going trip.

It seems unthinkable that the people can not have transportation unless they not only put up the money to build it where it is needed, but pay an excessive rate over their neighbor's because it is not a trunk line that extends a long distance to a market.

I have not analyzed any of the many other roads mentioned in Senator Cummins's article herein contained, but my general knowledge of the railroad situation in the United States causes me to believe an analysis would show a very large part of the weak roads and short lines are in very much the same predicament as described of the Minneapolis & St. Louis.

"Hope long deferred maketh the heart sick," and the hope of these starving, weak carriers to be taken into the family of the strong, as was intended by the authors of the transportation act of 1920, to be fed at the table in place of the occasional crust, has been long deferred, yet some weak properties have, I believe, existed since the war on hope.

The hope of the owners has been shared by the public depending on them for service, and they have refrained from complaint because of inadequate service, yet the public on a weak line is as much entitled to a fair chance in competition as his neighbor located on a strong line, and he continues to struggle along in the hope that the weak line will become a member of the strong line; destroy that hope and fortunes will be lost to the individual, as well as the owners of the road, and millions of the country's wealth will disappear. You will surely destroy the hope now in existence if you permit the strong to consolidate with the strong and deny the weak a place at the table.

Consolidation should be permitted to proceed but no consolidation should be permitted unless or until the status of all the lines in the territory where consolidation is proposed has been considered by the Interstate Commerce Commission, and ways and means found to preserve all carriers essential to the public in the territory where consolidation is proposed.

In the beginning of my testimony I said I was the receiver and president of the Kansas City, Wyandotte & Northwestern Railroad, and I will tell you now about this property. It was built 40 years ago and a friend of mine in Kansas City the other day sent me this paper, a marked copy:

IN KANSAS CITY 40 YEARS AGO

[From the Times and the Star, January 12, 1888]

"The officials of the Kansas City, Wyandotte & Northwestern road went to Seneca, Kans., yesterday to witness the completion of the new line to that point, a distance of 116 miles, where connection will be made with the St. Joseph & Grand Island Railroad. The new line will be in readiness to handle freight and passenger traffic by the close of next week, and it will open a territory wherein trade formerly has been debarred from Kansas City."

This line starts at Kansas City, Mo., and extends northwest through Kansas to the south line of Nebraska, thence across the State line of Nebraska to Virginia, Nebr., a distance of 161 miles from Kansas City, with a branch line 10 miles long from Mennenager Junction to Leavenworth, Kans. The people went out along this line, subdued the soil, built their homes, and created the village and markets. There was established on this line 22 towns, with the usual installation of grain elevators, lumber yards, coal yards, and stock-shipping pens, that had no other railroad, but was dependent wholly on this line for their railroad service.

The Government took this line over December 31, 1917, along with all other railroads; the United States Railroad Administration caused it to suspend operation December 1, 1919, and it came back to its owners too weak to again function, and before a settlement was completed with the Director General of Railroads, the weather stress on the property had progressed so far that sufficient funds could not be found to restore it to the required strength to resume service, and after seven years of idleness it was dismantled in 1926, although the people along this line were willing to tax themselves to the limit of their taxing law as aid to the construction of new lines or the rehabilitation of old lines, which in this case was about 25 per cent of all the new money required to resume service on this line, but the other 75 per cent could not be found.

Now, what happened to these 22 towns that were dependent upon the road? The lumber dealer was obliged to sacrifice his stock on hand and go out of

business; he could not move to some station on some other road because those stations were fully supplied with dealers. He had to sacrifice his buildings and plant.

The same with the coal dealer. The calamity to the stock buyer was not so great. He had little or no investment, but was out of a job and his sacrifice was only on his home in case he had one. The elevator man was hard hit. His elevator, without rail transportation, was a total loss. The banker was seriously crippled because, with a loss of the grain, livestock, lumber, and coal market destroyed at his town, a large part of his customers went to some other town with a market and did their business through the bank in the market town. Likewise, the tradesmen in all classes lost their customers. The banker and other business men then must go out into the world and start all over again. So much for the town people.

Now, what about the farmer that patronized these towns because he had less distance to travel to and from his market town. Because of this greater distance from the market town, I was told by many farmers that the decrease in value of their farms was estimated at $25 per acre. If this is so, then it represents a most serious loss to the land owners through decrease in value, which I estimate at $11,280,000 on 451,200 acres. According to the Government census of 1925, showing crop production in Kansas for 1924, this 451,200 acres, 83.6 per cent of which was farmed for crops, produced the following: Corn, 3,714,480 bushels or 129,506 tons; wheat, 1,627,560 bushels or 48,826 tons. In using the average for hogs in the State it produces a figure much too low because of the sparsely settled western part and I have not used it. From my experience in operating this property, there moved over it to Kansas City 20,000 hogs per annum from this effected territory, which for one year is 3,000 tons. There was also sold 452 tons of butter, butterfat, cream, and milk. The average for the State is entirely too low for this section because the road abandoned was located in the northeastern well-improved section, while the western section is very thinly populated.

The total number of farms along the line affected is 1,716 and the average tons of inbound coal, lumber, and farms supplies is 3 tons per farm or 5,148 tons per annum, so that not taking into consideration any of the horses, mules, cattle, or sheep that can be driven to market on foot, or the chickens and eggs that go to the market with the housewife on the weekly shopping days, we have a tonnage that must be transported each year by some highway vehicle of 186,932 tons, an average greater distance of 4 miles or 767,728 ton-miles.

I was told at the United States Bureau of Public Roads that any figures yet compiled showing the cost per ton-mile for transporting freight over highways by motor truck, were probably unreliable because apparently depreciation was not considered by truck operation, as some one buys a truck and wears it out and then is out of business; but the bureau furnished me a bulletin, No. 69, issued by the Engineers Experiment Station, Iowa State College, Ames, Iowa, dated July 9, 1924, "Highway transportation costs"

This bulletin shows that a 2-ton truck loaded with 2 tons can transport freight over a dirt road, and the roads in the territory affected are all dirt roads, for 10.18 cents per ton mile, making an annual additional cost to these people of $78,154.71 to do their marketing provided they do it with a 2-ton truck and draw 2 tons each trip. This loss, multiplied by the eight years they have been deprived of the closer markets because of shutting this road down, plus the drop in the value of their real estate, makes a total loss to date of $11,895,327.68, in addition to which the counties through which this line ran, eight in number, have lost $320,000 in taxes; the permanent annual loss to the farmers is $78,154.71 provided he owns a truck and draws 2 tons per load; but if the farmer does not own a truck (2-ton) and but few of them do, his cost by team is 33 cents per ton mile or a total per annum cost to transport 769,728 ton-miles of $254,000, and I believe this last figure more nearly represents the loss per annum to these farmers. The figures represent the haul additional to and in excess of the distance hauled before the road was removed or a loss in transportation cost during the last 8 years since the line ceased operation of $2,032,000, plus the decrease in value of farm lands of $11,280,000, making a total loss of $13,312,000 to the farmers owning and farming 451,200 acres in northeast Kansas and southeast Nebraska.

I now read a short article on page 6 of this pamphlet, under the heading "Much freight moved." This article was written by Senator Cummins:

"MUCH FREIGHT MOVED

"In 1922, under the high rates then prevailing, 23 of these class 1 railways, representing a main-track mileage of more than 8,000 miles, failed to earn the expenses of maintenance and operation, the aggregate deficit being between $9,000,000 and $10,000,000. Of these same railways, companies representing a main-track mileage of 23,000 miles earned from a fraction of 1 per cent to less than 3 per cent. Of the 30,000 miles of so-called short-line railways—that is to say, railways having gross operating revenues of less than $1,000,000 per year not included in the above computation—many of the lines earned less than operating expenses, and very few of them earned as much as 3 per cent on the lowest possible estimate of the value of their properties.

"STATISTICS STARTLING

"These are startling statistics, gathered from a year in which the railways carried the maximum volume of traffic at the highest rates ever known. It is my deliberate judgment that under present conditions a railway that does not earn a net operating income of at least 5½ per cent upon the value of the property rendering the service can not secure the new capital absolutely necessary for the enlargement of its facilities to meet the expanding demand of our constantly increasing production, and that railways which earn less than 3 per cent upon the value must eventually be abandoned and dismantled. This means, if the situation remains as it is, inadequate betterments upon about one-half of our entire mileage and the complete disuse of between 60,000 and 70,000 miles of railway which now render the only transportation service for many millions of people.

"Can one grasp the calamity to the people depending upon sixty or seventy thousand miles of railroad should it stop operation, or the great loss in national wealth, or the millions upon millions of dollars of new money required to provide some form of new transportation to substitute for that now in existence, it is truly appalling."

Gentlemen, I thank you.

The CHAIRMAN. The committee will stand adjourned until Monday at 10.15, a. m.

(Whereupon, at 12 o'clock noon, the committee adjourned until Monday, March 5, 1923, at 10.15 o'clock, a. m.)

END OF
TITLE